

7-22-2010

Pioneer Irrigation District v. City of Caldwell Clerk's Record v. 10 Dckt. 37242

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Vol. 10 of 25

(VOLUME 10)
IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

PIONEER IRRIGATION DISTRICT,

**Plaintiff-Counterdefendant-
Respondent,**

-VS-

CITY OF CALDWELL,

**Defendant-Counterclaimant-
Appellant.**

Appealed from the District of the Third Judicial District
for the State of Idaho, in and for Canyon County

Honorable GREGORY M. CULET, District Judge

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
Erik F Stidham
HOLLAND & HART LLP

Attorneys for Appellant

Scott L Campbell
MOFFATT THOMAS BARRETT
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Attorney for Respondent



37242

IN THE SUPREME COURT OF THE
STATE OF IDAHO

PIONEER IRRIGATION DISTRICT,)	
)	
Plaintiff-Counterdefendant-Respondent,)	
)	Supreme Court No. 37242
-vs-)	
)	
CITY OF CALDWELL,)	
)	
Defendant-Counterclaimant-Appellant.)	

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE GREGORY M. CULET, Presiding

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F I L E D
A.M. 4:08 P.M.

SEP 15 2009

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**AFFIDAVIT OF MARK ZIRSCHKY IN
SUPPORT OF PIONEER'S RESPONSE BRIEF
IN OPPOSITION TO CITY OF CALDWELL'S
SECOND MOTION FOR SUMMERY
JUDGMENT**

**AFFIDAVIT OF MARK ZIRSCHKY IN SUPPORT OF PIONEER'S
RESPONSE BRIEF IN OPPOSITION TO CITY OF CALDWELL'S
SECOND MOTION FOR SUMMERY JUDGMENT - 1**

Client:1358491.1

1623

ORIGINAL

STATE OF IDAHO)
) ss.
County of CANYON)

MARK ZIRSCHKY, having been duly sworn upon oath, deposes and states as follows:

1. I am the Assistant Superintendent for Pioneer Irrigation District ("Pioneer"). I make this affidavit based upon my own personal knowledge.
2. As the Assistant Superintendent, I am responsible in part for the coordination and supervision of district-wide operation and maintenance, including maintenance activities occurring during the irrigation off-season.
3. Irrigation season generally ends on or around October 15. Pioneer usually turns water into its system of canals near the beginning of April. In the interim, Pioneer is responsible for a number of maintenance tasks to ensure the safe and efficient operation of its water delivery facilities during the following irrigation season.
4. Importantly, the ground generally freezes in mid-November. Virtually all of Pioneer's ditch and canal maintenance activities are significantly slowed, if not entirely precluded, by frozen earth. Therefore, the time period between the close of irrigation season and when the ground freezes (generally, October 15 – November 15) is crucial to ensure the continued viability and safety of Pioneer's irrigation delivery system and adequate preparation for the following irrigation season. If stormwater pools or flows in Pioneer facilities during that time period, it can inhibit Pioneer's ability to maintain its facilities in good order.
5. After irrigation season, the following tasks must be completed in a timely fashion: (1) ditch burning; (2) blading the bottoms of the canals; (3) sloping and re-shaping the banks; (4) removing any silt buildup; (5) V-ditching small laterals; and (6) addressing and fixing

any problems with the irrigation delivery system observed or reported during the irrigation season, tasks which Pioneer cannot perform with live water in the facilities. To accomplish these tasks effectively, it is important that the facilities be dry. Usually, it takes approximately one (1) week for the facilities to dry out after the irrigation season ends. Therefore, Pioneer generally begins to address the listed tasks in late October.

6. Pioneer burns the ditches in order to rid Pioneer facilities of weeds and invasive plant species. To accomplish the task, Pioneer utilizes a pickup truck with a 300 gallon propane tank and a 30-50 foot hose with a torch on the end. A Pioneer employee walks the canal or ditch and burns the bed and banks. Standing or flowing water in Pioneer facilities impedes the progress of this activity and creates safety hazards. Dry conditions are important in order to ensure an effective burn and to ensure safe/stable footing for the employee operating the torch.

7. Pioneer blades the canals in order to level and grade the bottom of the canals. If the bottom of the canals have holes or inconsistent grading, erosion due to live water in the facilities during the irrigation season can create unsafe conditions. To accomplish this task, Pioneer utilizes a steel track D3 Caterpillar with a blade in the front. The D3 Caterpillar operates inside the canal and as it moves forward, the blade pushes silt and dirt to the side of the canal, leaving the bed consistently graded. Mud and standing or flowing water in Pioneer facilities presents substantial obstacles to accomplishing this task for two reasons. First, if the earth is muddy, it will simply fall back into the bed of the canal, creating inconsistencies and holes in the beds and banks of the canal. These grading flaws present safety issues by disturbing water flows which leads to erosion and banking, conditions which compromise the integrity of a canal. Second, if the bottom of the canal is muddy or inundated with water, the D3 Caterpillar can bury itself as it shapes the canals. Muddy canal banks present unsafe conditions for the

equipment operator when the D3 Caterpillar is entering or exiting the canal. Unstable canal banks do not only result in stuck equipment, but also increase the chances of a piece of equipment rolling over.

8. Pioneer also slopes the banks of the canals in order to provide consistent grading and proper flow of water during the irrigation season. To accomplish this task, Pioneer utilizes a D6 Caterpillar with steel cleats and a sloper arm. The D6 Caterpillar operates along the banks of the canal and the sloper arm shapes by rolling along the side of the canal and pulling, packing, and holding the dirt and silt to the side. Mud and water in the canal presents the same problems associated with the task of blading the canals. If the earth is muddy and water bound, the dirt rolls up the arm and simply slides back down, leaving large, inconsistent clumps of earth in the bottom of the canal which can cause hydraulic problems and safety concerns when the canal is full during the irrigation season.

9. Pioneer must also remove silt buildup during the irrigation offseason. Silt buildup must be removed in order to ensure proper flows and hydraulic consistency. To accomplish this task, Pioneer utilizes a steel track John Deere 190 Trackhoe or a steel track John Deere 690 Trackhoe. The trackhoe has a bucket arm and a Pioneer employee operates the arm to dig out silt, then places it on the bank for removal. The problems associated with silt removal that are caused by water in Pioneer facilities are similar to those caused by use of the D3 Caterpillar and D6 Caterpillar in wet conditions. First, mud placed on the bank is more likely to slide back down into the ditch or canal. Second, whereas dry silt can easily be removed immediately, muddy silt cannot. Thus, Pioneer's roadway is impeded by piles of mud as maintenance continues. Finally, doing this work on saturated canal banks presents safety hazards for Pioneer employees operating the trackhoe.

10. Pioneer also V-ditches the small laterals in order to ensure appropriate form and capacity for use during the irrigation season. To accomplish this task, Pioneer utilizes a steel track D4 Caterpillar. The D4 Caterpillar straddles and pulls dirt out of the lateral and shapes the bed and banks. When there is mud or water in the lateral, the mud simply slides off the sides of the lateral and back into the middle. Furthermore, the D4 Caterpillar is more likely to dig itself into the lateral in muddy conditions, creating inconsistent shaping and safety hazards for the operator.

11. During the irrigation off-season, Pioneer also engages in various structure construction and reconstruction projects involving concrete work and piping. These projects include construction or replacement of headgates, installation of crossing pipes, installation or reconstruction of check structures, and the rebuilding of ditches. To accomplish these tasks, Pioneer utilizes shovels and other hand tools, as well as its small trackhoe. Among the concerns presented by water in Pioneer's delivery facilities during such projects is the safety of Pioneer employees due to unstable footing and the instability of structures which are being removed or installed in wet and muddy conditions. Furthermore, such construction projects often leave the system vulnerable to flooding and other damage to Pioneer facilities and surrounding land, homes, and/or buildings should a storm event occur when the maintenance work is interrupted and has yet to be completed. For example, when Pioneer is in the process of replacing a headgate, there is an open hole in the ground instead of a lockable headgate, which leaves Pioneer unable to mitigate heavy flows in the delivery facilities after a storm event. Finally, construction and installation of certain structures in wet or muddy conditions increases the potential for the failure of such structures.

12. In addition to the issues off-season water presents to Pioneer with respect to the use of its large machinery and construction operations, flowing water in Pioneer facilities during the irrigation off-season presents safety hazards for routine maintenance such as trimming trees and bushes adjacent to its facilities. After one storm event, Pioneer employees had to wear waders in thigh-deep water to accomplish routine maintenance on the 500 Lateral. The thigh-deep water created footing concerns and presented a drowning hazard should the waders have suddenly filled with water and caused the employee to fall beneath the water surface. One can easily be held under water by the weight of the water-filled waders.

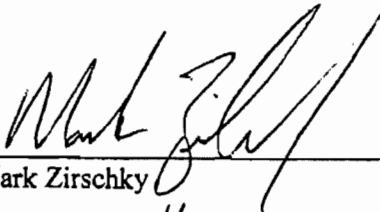
13. Furthermore, in past years, Pioneer has used a live water aquatic herbicide product to maintain ditches and canals. The product was generally applied throughout the irrigation season while there was still live water in the canals and ditches. Recently, however, the manufacturer of the product, Baker Hughes, has discontinued sales of the product to irrigation entities. Attached hereto as **Exhibit A** is a true and correct copy of a letter from Baker Hughes to Pioneer Irrigation District indicating the discontinuance of sales of the product to irrigation entities. Therefore, Pioneer has started to use an aquatic herbicide called Sonar A.S., which herbicide provides best results via application in dry conditions. Attached hereto as **Exhibit B** is a true and correct copy of the label with instructions for use of Sonar A.S. The General Instructions provide:

Sonar A.S. herbicide is a selective systemic aquatic herbicide for management of aquatic vegetation in fresh water ponds, lakes, reservoirs, drainage canals and irrigation canals, including dry or de-watered areas of these sites. Sonar A.S. is absorbed by plant shoots and from hydrosol by the roots of aquatic vascular plants. *For in-water treatments, it is important to maintain the specified concentration of Sonar A.S. in contact with the target plants for a minimum of 45 days. Rapid water movement or any condition which results in rapid dilution of Sonar A.S. in treated water will reduce its effectiveness.* In susceptible plants, Sonar A.S. inhibits

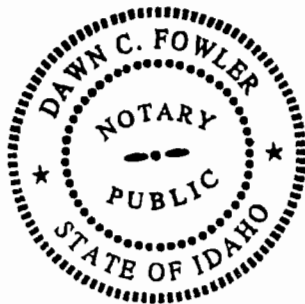
the formation of carotene. In the absence of carotene, chlorophyll is rapidly degraded by sunlight. Herbicidal symptoms of Sonar A.S. appear in seven to ten days and appear as white (chlorotic) or pink growing points. *Under optimum conditions, 30 to 90 days are required before the desired level of aquatic plant management is achieved with Sonar A.S.* Species susceptibility to Sonar A.S. may vary depending on time of year, stage of growth, and water movement. For best results, apply Sonar A.S. prior to initiation of weed growth or when weeds begin active growth. Application to mature target plants may require an application rate at the higher end of the specified rate range and may take longer to control.

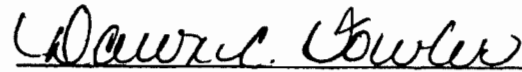
Exhibit B, p. 2 (emphasis added). In Pioneer's circumstances, application of the product is to be made as soon after the irrigation season as possible so that it can percolate into the soil throughout the winter in advance of any plant growth. Flowing water in Pioneer facilities in the 30 to 90 days following application risks negating the treatment by washing the application away and depositing it elsewhere in any given facility. Even more, to avoid digging out earth to which the herbicide has already been applied (thereby negating its intended effects), application of the new aquatic herbicide effectively requires that a large portion of the maintenance described above occur almost immediately after the irrigation season ends. In other words, the maintenance Pioneer used to do throughout the winter must now be complete before application of the new aquatic herbicide product. Consequently, Pioneer's already compressed off-season maintenance window is compressed even more. Thus, ponding or flowing water in Pioneer facilities during the irrigation off-season, and the maintenance interferences such water brings, are of even greater concern now than in the past.

Further your affiant sayeth naught.


Mark Zirschky

SUBSCRIBED AND SWORN to before me this 15th day of September, 2009.




NOTARY PUBLIC FOR IDAHO
Residing at Biose
My Commission Expires 7-16-2010

CERTIFICATE OF SERVICE

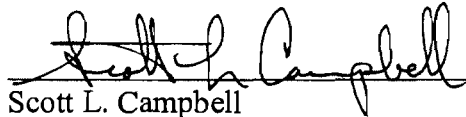
I HEREBY CERTIFY that on this 15th day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF MARK ZIRSCHKY IN SUPPORT OF PIONEER'S RESPONSE BRIEF IN OPPOSITION TO CITY OF CALDWELL'S SECOND MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

EXHIBIT A

TO AFFIDAVIT OF MARK ZIRSCHKY



Baker Petrolite

12645 West Airport Blvd.
Sugar Land, TX 77459
Tel. 281-276-5400
Fax: 281-276-5711

August 1, 2009

Pioneer Irrigation District
Attn: Jeff Scott
Box 426
Caldwell, ID 83606-0426 USA

To our Crop Protection customers:

For over 46 years Baker Petrolite's MAGNACIDE™ H Herbicide has helped you control aquatic vegetation in your irrigation systems. We will continue to meet your requirements for our product for the 2009 season. However, after the end of this season, this product will no longer be available for this application. This will enable us to renew the focus of our products, including acrolein, in our core businesses in the oilfield services industry.

As the season ends, we will contact you to arrange for the return of all of our product containers in your possession or control to our Taft, California facility. If product remains in those containers when they are returned, we will issue a credit to you for your unused product. If you do not have an outstanding balance with us, then we will issue a refund to you. We must receive all of your containers no later than December 31, 2009. There will be no carryover of product for use beyond 2009.

We wish to thank you for your continued use of our product through the years. Should you have questions, please contact your sales representative or the Bakersfield office at 661-834-5109.

Sincerely,

Patrick A. Marfone
President

EXHIBIT B

TO AFFIDAVIT OF MARK ZIRSCHKY

Specimen Label

Sonar[®] A.S.

Aquatic Herbicide



AN HERBICIDE FOR MANAGEMENT OF AQUATIC VEGETATION IN FRESH WATER PONDS, LAKES, RESERVOIRS, POTABLE WATER SOURCES, DRAINAGE CANALS AND IRRIGATION CANALS.

Active Ingredient

Fluridone:

1-methyl-3-phenyl-5-[3-(trifluoromethyl)phenyl]

-4(1H)-pyridinone 41.7%

Other Ingredients 58.3%

TOTAL 100.0%

Contains 4 pounds active ingredient per gallon.

Keep Out of Reach of Children

CAUTION / PRECAUCIÓN

Si usted no entiende la etiqueta, busque a alguien para que se la explique a usted en detalle. (If you do not understand the label, find someone to explain it to you in detail.)

Precautionary Statements

Hazards to Humans and Domestic Animals

Harmful if Swallowed, Absorbed Through Skin, or if Inhaled.

Avoid breathing of dust or contact with skin, eyes or clothing. Wash thoroughly with soap and water after handling. Remove contaminated clothing and wash before reuse.

ENVIRONMENTAL HAZARDS

Do not apply to water except as specified on the label. Do not contaminate water by disposal of equipment washwaters. Do not apply in tidalwater/brackish water. Lowest rates should be used in shallow areas where the water depth is considerably less than the average depth of the entire treatment site, for example, shallow shoreline areas. Trees and shrubs growing in water treated with Sonar A.S. herbicide may occasionally develop chlorosis. Follow use directions carefully so as to minimize adverse effects on non-target organisms.

First Aid

If in eyes

- Hold eye open and rinse slowly and gently with water for 15 - 20 minutes. Remove contact lenses, if present, after the first 5 minutes, then continue rinsing eye.
- Call a poison control center or doctor for treatment advice.

If on skin or clothing

- Take off contaminated clothing.
- Rinse skin immediately with plenty of water for 15 - 20 minutes.
- Call a poison control center or doctor for treatment advice.

If swallowed

- Call a poison control center or doctor immediately for treatment advice.
- Have person sip a glass of water if able to swallow.
- Do not induce vomiting unless told to do so by a poison control center or doctor.
- Do not give anything by mouth to an unconscious person.

If inhaled

- Move person to fresh air.
- If person is not breathing, call 911 or an ambulance, then give artificial respiration, preferably mouth-to-mouth if possible.
- Call a poison control center or doctor for further treatment advice.

EMERGENCY NUMBER

Have the product container or label with you when calling a poison control center or doctor, or going for treatment. In case of emergency endangering health or the environment involving this product, call INFOTRAC at 1-800-535-5053.

Notice: Read the entire label before using. Use only according to label directions. Before buying or using this product, read *Warranty Disclaimer, Inherent Risks of Use, and Limitation of Remedies* inside label booklet.

For product information, visit our web site at www.sepro.com.

Shake well before using.

EPA Reg. No. 67590-4
FPL081408

Trademark of SePRO Corporation.
SePRO Corporation 11550 North Meridian Street, Suite 600, Carmel, IN 46032 U.S.A.

Directions for Use

It is a violation of Federal law to use this product in a manner inconsistent with its labeling.

Read all *Directions for Use* carefully before applying.

Shake Well Before Using.

GENERAL INSTRUCTIONS

Sonar A.S. herbicide is a selective systemic aquatic herbicide for management of aquatic vegetation in fresh water ponds, lakes, reservoirs, drainage canals and irrigation canals, including dry or de-watered areas of these sites. Sonar A.S. is absorbed from water by plant shoots and from hydrosol by the roots of aquatic vascular plants. For in-water treatments, it is important to maintain the specified concentration of Sonar A.S. in contact with the target plants for a minimum of 45 days. Rapid water movement or any condition which results in rapid dilution of Sonar A.S. in treated water will reduce its effectiveness. In susceptible plants, Sonar A.S. inhibits the formation of carotene. In the absence of carotene, chlorophyll is rapidly degraded by sunlight. Herbicidal symptoms of Sonar A.S. appear in seven to ten days and appear as white (chlorotic) or pink growing points. Under optimum conditions, 30 to 90 days are required before the desired level of aquatic plant management is achieved with Sonar A.S. Species susceptibility to Sonar A.S. may vary depending on time of year, stage of growth, and water movement. For best results, apply Sonar A.S. prior to initiation of weed growth or when weeds begin active growth. Application to mature target plants may require an application rate at the higher end of the specified rate range and may take longer to control.

Sonar A.S. is not corrosive to application equipment.

The label provides recommendations on the use of a chemical analysis for the active ingredient. SePRO Corporation recommends the use of an Enzyme-Linked Immunoassay (ELISA Test) for the determination of the active ingredient concentration in the water. Contact SePRO Corporation for the utilization of this test, known as a FastEST*, for the incorporation of this analysis in your treatment program. Other proven chemical analyses for the active ingredient may also be used. The chemical analysis, a FastEST, is referenced in this label as the preferred method for the rapid determination of the concentration of the active ingredient in the water.

Application rates are provided in ounces or quarts of Sonar A.S. to achieve a desired concentration of the active ingredient in parts per billion (ppb). The maximum application rate or sum of all application rates is 90 ppb in ponds and 150 ppb in lakes, reservoirs and static canals per annual growth cycle. This maximum concentration is the amount of product calculated as the target application rate, NOT determined by testing the residues of the active ingredient in the treated water.

Application rates are provided in ounces or quarts of Sonar A.S. to achieve a desired concentration of the active ingredient in parts per billion (ppb). **The maximum application rate or sum of all application rates is 90 ppb in ponds and 150 ppb in lakes, reservoirs and static canals per annual growth cycle.** This maximum concentration is the amount of product calculated as the target application rate, NOT determined by testing the residues of the active ingredient in the treated water.

GENERAL USE PRECAUTIONS

- **Obtain Required Permits:** Consult with appropriate state or local water authorities before applying this product. Permits may be required by state or local public agencies.
- **Chemigation:** Do not apply Sonar A.S. through any type of irrigation system.
- **Hydroponic Farming:** Do not use Sonar A.S. treated water for hydroponic farming.
- **Greenhouse and Nursery Plants:** Do not use Sonar A.S. treated water for irrigating greenhouse or nursery plants. Use of an approved assay should confirm that residues are <1 ppb.
- **WATER USE RESTRICTIONS FOLLOWING APPLICATIONS WITH SONAR A.S. (DAYS)**

Application Rate	Potable Water Intake	Potable Water Intake	Potable Water Intake	Potable Water Intake	See irrigation instructions below
Maximum Rate (150 ppb) or less	0	0	0	0	

† Note below, under Potable Water Intakes, the information for application of Sonar A.S. within 1/4 mile (1,320 feet) of a functioning potable water intake.

†† Note below, under Irrigation, specific time frames or fluridone residues that provide the widest safety margin for irrigating with fluridone treated water.

• **Potable Water Intakes:** In lakes and reservoirs or other sources of potable water, **do not apply** Sonar A.S. at application rates greater than 20 ppb within one-fourth mile (1,320 feet) of any functioning potable water intake. At application rates of 6 - 20 ppb, Sonar A.S. **may be applied** where functioning potable water intakes are present. **NOTE: Existing potable water intakes which are no longer in use, such as those replaced by potable water wells or connections to a municipal water system, are not considered to be functioning potable water intakes.**

• **Irrigation:** Irrigation from a Sonar A.S. treated area may result in injury to the irrigated vegetation. Follow these precautions and inform those who irrigate from areas treated with Sonar A.S. of the irrigation time frames or water assay requirements presented in the table below. Follow the following time frames and assay directions to reduce the potential for injury to vegetation irrigated with water treated with Sonar A.S. Greater potential for crop injury occurs where Sonar A.S. treated water is applied to crops grown on low organic and sandy soils.

Days After Application			
Application Site	Established Tree Crops	Established Row Crops, Turf, Pasture	Newly Seeded Crops, Seedlings, or Areas in an Orchard Including Discarded Golf Course Greens
¹ Ponds and Static Canals	7	30	Assay required
Canals	7	14	Assay required
¹¹ Lakes and Reservoirs	7	14	Assay required
¹¹¹ Dry or de-watered canals	0	0	†††

¹ For purposes of Sonar A.S. labeling, a pond is defined as a body of water 10 acres or less in size. A lake or reservoir is greater than 10 acres.

¹¹ In lakes and reservoirs where one-half or greater of the body of water is treated, use the pond and static canal irrigation precautions. When applying Sonar A.S. to exposed sediments of aquatic sites such as lakes and reservoirs, follow these time frames prior to using water for irrigation once sites are reflooded.

¹¹¹ When Sonar A.S. is applied to exposed sediments of dry or de-watered canals, allow canals to refill for a minimum of 24 hours before using water for irrigation.

Where the use of Sonar A.S. treated water is desired for irrigating crops prior to the time frames established above, the use of a FastEST assay is recommended to measure the concentration in the treated water. Where a FastEST has determined that the concentrations are less than 10 parts per billion, there are no irrigation precautions for irrigating established tree crops, established row crops or turf. For tobacco, tomatoes, peppers or other plants within the Solanaceae Family and newly seeded crops or newly seeded grasses such as overseeded golf course greens, do not use Sonar A.S. treated water if measured fluridone concentrations are greater than 5 ppb. Furthermore, when rotating crops, do not plant members of the Solanaceae family in land that has been previously irrigated with fluridone concentrations in excess of 5 ppb. It is recommended that an aquatic specialist be consulted prior to commencing irrigation of these sites.

PLANT CONTROL INFORMATION

Sonar A.S. selectivity is dependent upon dosage, time of year, stage of growth, method of application and water movement. The following categories, controlled, partially controlled, and not controlled are provided to describe expected efficacy under ideal treatment conditions using higher to maximum label rates. Use of lower rates will increase selectivity of some species listed as controlled or partially controlled. Additional aquatic plants may be controlled, partially controlled, or tolerant to Sonar A.S. Consult an aquatic specialist prior to application of Sonar A.S. to determine a plant's susceptibility to Sonar A.S.

NOTE: algae (chara, nitella, and filamentous species) are not controlled by Sonar A.S.

VASCULAR AQUATIC PLANTS CONTROLLED BY SONAR A.S.

Floating Plants:

Common duckweed (*Lemna minor*)

Emerald Plants:

Spatterdock (*Nuphar luteum*)

Water-lily (*Nymphaea* spp.)

Submersed Plants:

Bladderwort (*Utricularia* spp.)

Common coontail (*Ceratophyllum demersum*)

Common Elodea (*Elodea canadensis*)

Egeria, Brazilian Elodea (*Egeria densa*)

Fanwort, Cabomba (*Cabomba caroliniana*)

Hydrilla (*Hydrilla verticillata*)

Najas (*Najas* spp.)

Pondweed (*Potamogeton* spp., except Illinois pondweed)

Watermilfoil (*Myriophyllum* spp. except variable-leaf milfoil)

Shoreline Grasses:

Paragrass (*Urochloa mutica*)

VASCULAR AQUATIC PLANTS PARTIALLY CONTROLLED BY SONAR A.S.:

Floating Plants:

Common watermeal (*Wolffia columbiana*)[†]

Salvinia (*Salvinia* spp.)

Emerald Plants:

Alligatorweed (*Alternanthera philoxeroides*)

American lotus (*Nelumbo lutea*)

Cattail (*Typha* spp.)

Creeping waterprimrose (*Ludwigia peploides*)

Parrotfeather (*Myriophyllum aquaticum*)

Smartweed (*Polygonum* spp.)

Spatterdock (*Nuphar luteum*)

Spikerush (*Eleocharis* spp.)

Waterpurslane (*Ludwigia palustris*)

Watershield (*Brasenia schreberi*)

Submersed Plants:

Illinois pondweed (*Potamogeton illinoensis*)

Limnophila (*Limnophila sessiliflora*)

Tapegrass, American eelgrass (*Vallisneria spiralis*)

Watermilfoil-variable-leaf (*Myriophyllum heterophyllum*)

Shoreline Grasses:

Barnyardgrass (*Echinochloa crusgalli*)

Giant cutgrass (*Zizaniopsis millicoma*)

Reed canarygrass (*Phalaris arundinacea*)

Southern watergrass (*Hydrochloa carolinensis*)

Torpedograss (*Panicum repens*)

[†] Partial control only with Sonar A.S. applied at the maximum labeled rate.

VASCULAR AQUATIC PLANTS NOT CONTROLLED BY SONAR A.S.:

Floating Plants:

Waterlettuce (*Pistia stratiotes*)

Emerged Plants:

American frogbit (*Limnobium spongia*)

Arrowhead (*Sagittaria* spp.)

Bacopa (*Bacopa* spp.)

Big floatingheart, banana lily (*Nymphoides aquatica*)

Bulrush (*Scirpus* spp.)

Pickersweed, lanceleaf (*Pontederia* spp.)

Rush (*Juncus* spp.)

Water pennywort (*Hydrocotyle* spp.)

Shoreline Grasses:

Maidencane (*Panicum hemitomon*)

MIXING AND APPLICATION DIRECTIONS

The aquatic plants present in the treatment site should be identified prior to application to determine their susceptibility to Sonar A.S. It is important to determine the area (acres) to be treated and the average depth in order to select the proper application rate. Do not exceed the maximum labeled rate for a given treatment site per annual growth cycle.

Shake Sonar A.S. well before using. Add the specified amount of Sonar A.S. to water in the spray tank during the filling operation. Agitate while filling and during spraying. Surface or subsurface application of the spray can be made with conventional spray equipment. Sonar A.S. can also be applied near the surface of the hydrosol using weighted trailing hoses. A spray volume of 5 to 100 gallons per acre may be used. Sonar A.S. may also be diluted with water and the concentrated mix metered into the pumping system.

Tank-Mix Directions

Sonar A.S. may be tank mixed with other aquatic herbicides and algaecides to enhance efficacy and plant selectivity. Refer to the companion herbicide or algaecide label for use directions, precautions, and restrictions on use.

Application to Ponds

Sonar A.S. may be applied to the entire surface area of a pond. For single applications, rates may be selected to provide 45 to 90 ppb to the treated water. Use the higher rate within the rate range where there is a dense weed mass, when treating more difficult to control species, and for ponds less than 5 acres in size with an average depth less than 4 feet. Application rates necessary to obtain these concentrations are shown in the following table. For additional application rate calculations, refer to the *Application Rate Calculation-Ponds, Lakes and Reservoirs* section of this label. Split or multiple applications may be used where

dilution of treated water is anticipated; however, the sum of all applications must not exceed a total of 90 ppb per annual growth cycle.

Application Rates for Ponds

Average Water Depth of Treatment Site (feet)	Ounce of Sonar A.S. Per Treated Surface Area to Achieve		Pond Ounce of Sonar A.S. Per Treated Surface Area to Achieve	
	45 ppb	90 ppb	45 ppb	90 ppb
1	0.12	0.24	3.8	7.7
2	0.24	0.49	7.7	15.7
3	0.37	0.73	11.8	23.4
4	0.49	0.98	15.7	31.4
5	0.61	1.22	19.5	39.0
6	0.73	1.46	23.4	46.7
7	0.85	1.70	27.2	54.4
8	0.98	1.95	31.4	62.4
9	1.10	2.19	35.2	70.1
10	1.22	2.44	39.0	78.1

Application to Lakes and Reservoirs

The following treatments may be used for treating both whole lakes or reservoirs and partial areas of lakes or reservoirs (bays, etc.). For best results in treating partial lakes and reservoirs, Sonar A.S. treatment areas should be a minimum of 5 acres in size. Treatment of areas smaller than 5 acres or treatment of narrow strips such as boat lanes or shorelines may not produce satisfactory results due to dilution by untreated water. Rate ranges are provided as a guide to include a wide range of environmental factors, such as, target species, plant susceptibility, selectivity and other aquatic plant management objectives. Application rates and methods should be selected to meet the specific lake/reservoir aquatic plant management goals.

A. Whole Lake or Reservoir Treatments (Limited or No Water Discharge)

1. Single Application to Whole Lakes or Reservoirs

Where single applications to whole lakes or reservoirs are desired, apply Sonar A.S. at an application rate of 10 to 90 ppb. Application rates necessary to obtain these concentrations in treated water are shown in the following table. For additional rate calculations, refer to the *Application Rate Calculation — Ponds, Lakes, and Reservoirs* section of the label. Choose an application rate from the table below to meet the aquatic plant management objective. **Where greater plant selectivity is desired such as when controlling Eurasian watermilfoil and curlyleaf pondweed, choose an application rate lower in the rate range.** For other plant species, SePRO recommends contacting an aquatic specialist in determining when to choose application rates lower in the rate range to meet specific plant management goals. Use the higher rate within the rate range where there is a dense weed mass or when treating more difficult to control plant species. Retreatments may be required to control more difficult to control species or in the event of a heavy rainfall event where dilution of the treatment concentration has occurred. In these cases, a second application or more may be required; however, the sum of all

applications cannot exceed 150 ppb per annual growth cycle. Refer to the section of this label entitled, *Split or Multiple Applications to Whole Lakes or Reservoirs*, for guidelines and maximum rate allowed.

Single Application Rates				
Average Water Depth of Treatment Site (feet)	0.03 Quarts of Sonar A.S. per Treated Surface Acre	0.24 Quarts of Sonar A.S. per Treated Surface Acre	1.0 Quart of Sonar A.S. per Treated Surface Acre	7.7 Quarts of Sonar A.S. per Treated Surface Acre
1	0.03	0.24	1.0	7.7
2	0.05	0.49	1.8	15.7
3	0.08	0.73	2.6	23.4
4	0.11	0.98	3.2	31.4
5	0.14	1.22	4.5	39.0
6	0.16	1.46	5.1	46.7
7	0.19	1.70	6.1	54.4
8	0.22	1.95	7.0	62.4
9	0.24	2.19	7.6	70.1
10	0.27	2.44	8.6	78.1
11	0.30	2.68	9.6	86.0
12	0.32	2.93	10.2	93.6
13	0.35	3.17	11.2	101.4
14	0.38	3.42	12.1	109.4
15	0.41	3.68	13.1	117.1
16	0.43	3.90	13.8	124.8
17	0.46	4.15	14.7	132.2
18	0.49	4.39	15.7	140.5
19	0.51	4.63	16.3	148.2
20	0.54	4.88	17.3	158.2

2. Split or Multiple Applications to Whole Lakes or Reservoirs

To meet certain plant management objectives, split or multiple applications may be desired in making whole lake treatments. Split or multiple application programs are desirable when the objective is to use the minimum effective dose and, through the use of a water analysis, e.g. a FastEST, add additional Sonar A.S. to maintain this lower dose for the sufficient time to ensure efficacy and enhance selectivity. Water may be treated at an initial application of 4 to 50 ppb. Additional split applications should be conducted to maintain a sufficient concentration for a minimum of 45 days or longer. **In controlling Eurasian watermilfoil and curlyleaf pondweed and where greater plant selectivity is desired, choose an application rate lower in the rate range.** For other plant species, SePRO recommends contacting an aquatic specialist in determining when to choose application rates lower in the rate range to meet specific plant management goals. When utilizing split or multiple applications of Sonar A.S., the utilization of FastEST is strongly recommended to determine the actual concentration in the water over time. For split or multiple applications, the sum of all applications must not exceed 150 ppb per annual growth cycle.

NOTE: In treating lakes or reservoirs that contain functioning potable water intakes and the application requires treating within 1/4 mile of a potable water intake, no single application can exceed 20 ppb. Additionally, the sum of all applications cannot exceed 150 ppb per annual growth cycle.

B. Partial Lake or Reservoir Treatments

Where dilution of Sonar A.S. with untreated water is anticipated, such as in partial lake or reservoir treatments, split or multiple applications may be used to extend the contact time to the target plants. The application rate and use frequency of Sonar A.S. in a partial lake is highly dependent upon the treatment area. An application rate at the higher end of the specified rate range may be required and frequency of applications will vary depending upon the potential of untreated water diluting the Sonar A.S. concentration in the treatment area. Use a rate at the higher end of the rate range where greater dilution with untreated water is anticipated.

1. Treatment Areas Greater Than 1/4 Mile from a Functioning Potable Water Intake

For single applications, apply Sonar A.S. at application rates from 30 to 150 ppb. Split or multiple applications may be made; however, the sum of all applications cannot exceed 150 ppb per annual growth cycle. Split applications should be conducted to maintain a sufficient concentration in the target area for a period of 45 days or longer. The use of a FastEST is recommended to maintain the desired concentration in the target area over time.

2. Treatment Areas Within 1/4 Mile of a Functioning Potable Water Intake

In treatment areas that are within 1/4 mile of a potable water intake, no single application can exceed 20 ppb. When utilizing split or multiple applications of Sonar A.S. for sites which contain a potable water intake, a FastEST is required to determine the actual concentration in the water. Additionally, the sum of all applications cannot exceed 150 ppb per annual growth cycle.

APPLICATION RATE CALCULATION – PONDS, LAKES AND RESERVOIRS

The amount of Sonar A.S. to be applied to provide the desired ppb concentration of active ingredient in treated water may be calculated as follows:

$$\text{Quarts of Sonar A.S. required per treated surface acre} = \text{Average water depth of treatment site (feet)} \times \text{Desired ppb concentration of active ingredient} \times 0.0027$$

For example, the quarts per acre of Sonar A.S. required to provide a concentration of 25 ppb of active ingredient in water with an average depth of 5 feet is calculated as follows:

$$5 \times 25 \times 0.0027 = 0.33 \text{ quarts per treated surface acre}$$

When measuring quantities of Sonar A.S., quarts may be converted to fluid ounces by multiplying quarts to be measured x 32. For example, 0.33 quarts x 32 = 10.5 fluid ounces.

NOTE: Calculated rates may not exceed the maximum allowable rate in quarts per treated surface acre for the water depth listed in the application rate table for the site to be treated.

Days After Application

Application Site	Established Tree Crops	Established Row Crops, Turf Plants	Newly Seeded Crops/Seeds in Areas to be Planted, Including Overseeded Golf Course Greens
Ponds and Static Canals	7	30	Assay required
Canals	7	14	Assay required
Lakes and Reservoirs	7	14	Assay required
Dry or de-watered canals	0	0	†††

† For purposes of Sonar A.S. labeling, a pond is defined as a body of water 10 acres or less in size. A lake or reservoir is greater than 10 acres.

†† In lakes and reservoirs where one-half or greater of the body of water is treated, use the pond and static canal irrigation precautions. When applying Sonar A.S. to exposed sediments of aquatic sites such as lakes and reservoirs, follow these time frames prior to using water for irrigation once sites are reflooded.

††† When Sonar A.S. is applied to exposed sediments of dry or de-watered canals, allow canals to refill for a minimum of 24 hours before using water for irrigation.

Where the use of Sonar A.S. treated water is desired for irrigating crops prior to the time frames established above, the use of a FastEST assay is recommended to measure the concentration in the treated water. Where a FastEST has determined that the concentrations are less than 10 parts per billion, there are no irrigation precautions for irrigating established tree crops, established row crops or turf. For tobacco, tomatoes, peppers or other plants within the Solanaceae Family and newly seeded crops or newly seeded grasses such as overseeded golf course greens, do not use Sonar A.S. treated water if measured fluridone concentrations are greater than 5 ppb. Furthermore, when rotating crops, do not plant members of the Solanaceae family in land that has been previously irrigated with fluridone concentrations in excess of 5 ppb. It is recommended that an aquatic specialist be consulted prior to commencing irrigation of these sites.

PLANT CONTROL INFORMATION

Sonar A.S. selectivity is dependent upon dosage, time of year, stage of growth, method of application and water movement. The following categories, controlled, partially controlled, and not controlled are provided to describe expected efficacy under ideal treatment conditions using higher to maximum label rates. Use of lower rates will increase selectivity of some species listed as controlled or partially controlled. Additional aquatic plants may be controlled, partially controlled, or tolerant to Sonar A.S. Consult an aquatic specialist prior to application of Sonar A.S. to determine a plant's susceptibility to Sonar A.S.

NOTE: algae (chara, nitella, and filamentous species) are not controlled by Sonar A.S.

VASCULAR AQUATIC PLANTS CONTROLLED BY SONAR A.S.

Floating Plants:

Common duckweed (*Lemna minor*)

Emerald Plants:

Spatterdock (*Nuphar luteum*)

Water-lily (*Nymphaea* spp.)

Submersed Plants:

Bladderwort (*Utricularia* spp.)

Common coontail (*Ceratophyllum demersum*)

Common Elodea (*Elodea canadensis*)

Egeria, Brazilian Elodea (*Egeria densa*)

Fanwort, Cabomba (*Cabomba caroliniana*)

Hydrilla (*Hydrilla verticillata*)

Naiad (*Najas* spp.)

Pondweed (*Potamogeton* spp., except Illinois pondweed)

Watermilfoil (*Myriophyllum* spp. except variable-leaf milfoil)

Shoreline Grasses:

Paragrass (*Urochloa mutica*)

VASCULAR AQUATIC PLANTS PARTIALLY CONTROLLED BY SONAR A.S.:

Floating Plants:

Common watermeal (*Wolffia columbiana*)[†]

Salvinia (*Salvinia* spp.)

Emerald Plants:

Alligatorweed (*Alternanthera philoxeroides*)

American lotus (*Nelumbo lutea*)

Cattail (*Typha* spp.)

Creeping waterprimrose (*Ludwigia peploides*)

Parrotfeather (*Myriophyllum aquaticum*)

Smartweed (*Polygonum* spp.)

Spatterdock (*Nuphar luteum*)

Spikerush (*Eleocharis* spp.)

Waterpurslane (*Ludwigia palustris*)

Watershield (*Brasenia schreberi*)

Submersed Plants:

Illinois pondweed (*Potamogeton illinoensis*)

Limnophila (*Limnophila sessiliflora*)

Tapegrass, American eelgrass (*Vallisneria spiralis*)

Watermilfoil-variable-leaf (*Myriophyllum heterophyllum*)

Shoreline Grasses:

Barnyardgrass (*Echinochloa crusgalli*)

Giant cutgrass (*Zizaniopsis miliacea*)

Reed canarygrass (*Phalaris arundinacea*)

Southern watergrass (*Hydrochloa carolinensis*)

Torpedograss (*Panicum repens*)

[†] Partial control only with Sonar A.S. applied at the maximum labeled rate.

Warranty Disclaimer

SePRO Corporation warrants that the product conforms to the chemical description on the label and is reasonably fit for the purposes stated on the label when used in strict accordance with the directions, subject to the inherent risks set forth below.

SEPRO CORPORATION MAKES NO OTHER EXPRESS OR IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER EXPRESS OR IMPLIED WARRANTY.

Inherent Risks of Use

It is impossible to eliminate all risks associated with use of this product. Plant injury, lack of performance, or other unintended consequences may result because of such factors as use of the product contrary to label instructions (including conditions noted on the label such as unfavorable temperatures, soil conditions, etc.), abnormal conditions (such as excessive rainfall, drought, tornadoes, hurricanes), presence of other materials, the manner or application, or other factors, all of which are beyond the control of SePRO Corporation as the seller. To the extent consistent with applicable law, all such risks shall be assumed by buyer.

Limitation of Remedies

To the extent consistent with applicable law, the exclusive remedy for losses or damages resulting from this product (including claims based on contract, negligence, strict liability, or other legal theories) shall be limited to, at SePRO Corporation's election, one of the following:

- (1) Refund of purchase price paid by buyer or user for product bought, or
- (2) Replacement of amount of product used.

To the extent consistent with applicable law, SePRO Corporation shall not be liable for losses or damages resulting from handling or use of this product unless SePRO Corporation is promptly notified of such losses or damages in writing. In no case shall SePRO Corporation be liable for consequential or incidental damages or losses.

The terms of the *Warranty Disclaimer* above and this *Limitation of Remedies* cannot be varied by any written or verbal statements or agreements. No employee or sales agent of SePRO Corporation or the seller is authorized to vary or exceed the terms of the *Warranty Disclaimer* or *Limitations of Remedies* in any manner.

Scott L. Campbell, ISB No. 2251
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18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

FILED
A.M. 4:08 P.M.

SEP 15 2009

**CANYON COUNTY CLERK
K CANNON, DEPUTY**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

AFFIDAVIT OF ANDREW J. WALDERA

STATE OF IDAHO)
) ss.
County of Ada)

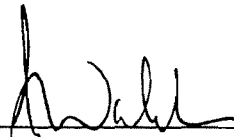
Andrew J. Waldera, having been duly sworn upon oath, deposes and states as follows:

1. I am an attorney duly licensed to practice law in the state of Idaho. I am one of the attorneys representing Pioneer Irrigation District ("Pioneer") in the above-referenced matter. I have access to the client's files in this matter, and make this affidavit based upon my personal knowledge.

2. On April 17, 2006, I appeared on behalf of Pioneer at a Caldwell City Council meeting. The purpose of my appearance at that meeting was to present testimony in opposition to the City's adoption of the its proposed emergency municipal stormwater policy which later became a permanent ordinance in September 2006. To the extent others may interpret my testimony otherwise, my testimony intended to express/maintain Pioneer's zero discharge policy with respect to the discharge of urban/municipal stormwater into irrigation delivery or irrigation drainage facilities owned, operated or maintained by Pioneer.

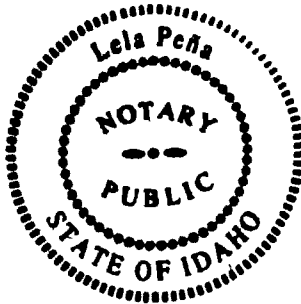
3. I also presented written comments to the Caldwell City Council at that meeting. A true and correct copy of those written comments are attached hereto as Exhibit A, and were produced to the City as Bates No. PID044523. For the reasons stated within Exhibit A attached hereto, among others, Pioneer was not and is not willing to approve or authorize the discharge of urban/municipal stormwater into the irrigation facilities it owns, operates or maintains.

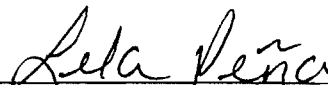
Further your affiant sayeth naught.



Andrew J. Waldera

SUBSCRIBED AND SWORN to before me this 15th day of September, 2009.





NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 5-31-2012

CERTIFICATE OF SERVICE

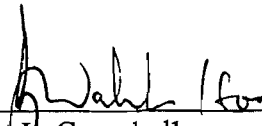
I HEREBY CERTIFY that on this 15th day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF ANDREW J. WALDERA** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

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J. Fredrick Mack
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Boise, ID 83701-2527
Fax: 343-8869

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☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

EXHIBIT A

TO AFFIDAVIT OF ANDREW J. WALDERA

PIONEER IRRIGATION DISTRICT'S POSITION STATEMENT REGARDING CONTINUATION OF HISTORICALLY DRAINED LANDS

Section 100.4 of the April 2006 City of Caldwell Emergency Draft Caldwell Municipal Stormwater Policy correctly points out that as land is developed soil is graded and covered over with impervious surfaces that prevent infiltration and create storm water runoff that must be drained. Such runoff should not be drained through existing irrigation drainage facilities even if the post development land proposed for such drainage is land that used to be historically drained in such a manner. Existing irrigation drainage facilities were designed to drain excess water from undeveloped agricultural lands, and were not designed, constructed, and/or not maintained to accept storm water runoff from developed lands.

- Existing irrigation drainage facilities owned, operated, and/or maintained by Pioneer Irrigation District were designed to drain undeveloped lands, to carry away excess irrigation water that was saturating the ground and poisoning it with excess salt content from irrigation practices upstream coupled with local irrigation. The alkali soil condition was rendering some lands useless. The drains were designed, constructed, and are maintained with the capacity to drain those undeveloped, agricultural lands—lands that are still capable of naturally absorbing storm events due to the fact that they are not paved over. Development of these lands vastly increases the volumes and speed of runoff as infiltration is no longer possible. These increases quickly overwhelm the capacity of the existing drains, causing flooding. Agricultural lands were/are historically entitled to drainage through irrigation drainage facilities. But, that drainage capacity was developed to handle the much smaller amounts of water from undeveloped lands.
- Existing irrigation drains are not solely “drains.” The “drains” do provide drainage of lands, but also deliver live irrigation water. One man’s waste water is another man’s irrigation water. Urban storm water drainage into irrigation drains threatens the quality of the water for those who depend upon irrigation water conveyed by the drains. Pioneer is responsible for both irrigation drainage and delivery functions, and can be held liable for damage caused by those activities (such as the delivery of tainted irrigation water or flooding).
- Drainage of urban storm water into historically developed irrigation drains implicates federal Clean Water Act (CWA) exposure. Currently, Pioneer is exempt from CWA liability due to the agricultural return flow exemption. CWA § 402(l)(1) If Pioneer drainage facilities accept anything but agricultural irrigation return flows, the exemption may be lost.

BOI_MT2:613324.2

FILED
A.M. 4:08 P.M.

SEP 15 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

Scott L. Campbell, ISB No. 2251
Bradley J Williams, ISB No. 4019
Tara Martens, ISB No. 5773
Dylan B. Lawrence, ISB No. 7136
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18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**AFFIDAVIT OF WILLIAM J. MASON IN
OPPOSITION TO CALDWELL'S SECOND
MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Canyon)

WILLIAM J. MASON, having been duly sworn upon oath, deposes and states as follows:

1. I am a professional civil engineer and a principal in the engineering firm Mason & Stanfield, Inc. I have engineering experience in the areas of hydraulics and land development. I have more than 15 years of experience in roadway and drainage system and grading plan design, project management, construction surveying, and construction observation. My design experience includes rural and urban roadway and drainage; flat and mountainous roadway and drainage; storm water controls; erosion and sediment control systems and small to large sized grading plans. Also, I have provided engineering services to Pioneer since approximately 1999, and am familiar with Pioneer's irrigation delivery and drainage system and facilities. I have also been retained by Pioneer to provide expert opinion testimony in this matter. I also hold a Land Surveyor-in-Training license. My business address is 314 Badiola Street, Caldwell, Idaho 83605. I make this Affidavit based upon my personal knowledge.

2. I was asked to review the stormwater infrastructure cost estimates contained within the Affidavit of Brent Orton in Support of Caldwell's Motion for Summary Judgment, dated July 28, 2009 ("Orton Aff."). In reviewing the cost estimates set forth in Mr. Orton's affidavit and preparing the content of my affidavit, I reviewed, among other things, the Orton Affidavit itself, the materials marked as Exhibit 5 to the deposition of Mr. Orton, dated August 27, 2009, and had the benefit of being present during Mr. Orton's August 27, 2009 deposition. In short, Mr. Orton's affidavit states that it will cost the City of Caldwell \$3,649,848.00 to remove the existing municipal stormwater drainage outfalls identified therein,

and to design and construct an alternative "Manual-compliant" retention-based municipal stormwater management system. Orton Aff. at ¶ 16. It is my opinion that these estimates are unreasonably excessive.

3. Among other reasons, Mr. Orton's cost estimates are unreasonable because he relies upon a stormwater easement acquisition cost of \$4.50 per square foot of property. This estimate is unreasonable because that value was derived from a recent condemnation proceeding involving the purchase of developed property, including a house. The acquisition and use of a stormwater easement should not require the destruction of existing buildings. Consequently, the land value associated with the purchase of such an easement would be substantially less than Mr. Orton's \$4.50 per square foot assumption.

4. Approximately \$1,659,200.00 of Mr. Orton's overall cost estimate consists of piping and land acquisition costs associated with piping the municipal stormwater currently draining through outfalls A-15 and A-17 for direct discharge to the Boise River. Such an approach is excessive and unnecessary. There is no reason why the infrastructure corresponding to outfalls A-15 and A-17 cannot be redesigned and retrofitted as retention facilities. While Mr. Orton contends that local groundwater elevations prevent the use of underground retention facilities, there is nothing that precludes the construction of retention facilities on the land surface. Moreover, such a facility could be constructed directly across the street (on the east side of Aviation Way) on a portion of what is presently a farm field (undeveloped ground with a correspondingly low acquisition cost). As an aside, Mr. Orton's contention that current groundwater elevations in the vicinity of outfalls A-15 and A-17 preclude the construction of on-site underground retention facilities calls into question the adequacy and functioning of the dry well and point discharge system currently in place. If Mr. Orton's

groundwater elevation contention is correct, rising groundwater elevations have effectively limited the capacity of the dry wells associated with outfalls A-15 and A-17. Consequently, more municipal stormwater is being discharged to Pioneer's "A" Drain than was originally intended and designed (*i.e.*, the municipal stormwater system required and approved by the City of Caldwell is failing and further burdening the "A"-Drain).

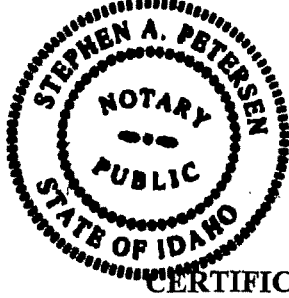
5. Attached hereto as Exhibit A is a true and correct copy of my cost estimate opinion of what it would cost the City of Caldwell to either: (A) remove the referenced outfalls and the infrastructure associated therewith; or (B) simply plug and abandon the existing infrastructure (thereby rendering the outfalls inoperable, but leaving them in place). Option A would cost the City approximately \$30,200.00 to complete, while Option B would cost the City approximately \$17,600 to complete.

6. I understand that a portion of the \$3,649,848.00 estimated by Mr. Orton includes the redesign and construction of an alternative municipal stormwater drainage system capable of handling the stormwater currently discharged through the referenced outfalls. However, I cannot at this time review that portion of Mr. Orton's cost estimate because City has not timely produced the storm drainage design criteria data that Mr. Orton relied upon in tabulating his cost estimate. For example, I have not had access to the drainage areas, runoff coefficients, peak flow estimates, or volume estimates relied upon by Mr. Orton. Therefore, I could not construct a conceptual retention design cost estimate for outfalls 5-2, 5-10, or B-1 for purposes of comparison to Mr. Orton's estimates. Unfortunately, Exhibit 5 to Mr. Orton's deposition, dated August 27, 2009, does not include this critical information.

Further your affiant sayeth naught.

William J. Mason
William J. Mason

SUBSCRIBED AND SWORN to before me this 15 day of September, 2009.



Stephen A. Petersen
NOTARY PUBLIC FOR IDAHO
Residing at MIDDLETON, IDAHO
My Commission Expires 9/29/14

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF WILLIAM J. MASON IN OPPOSITION TO CALDWELL'S SECOND MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
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☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
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101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

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☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile

Scott L. Campbell
Scott L. Campbell

EXHIBIT A

TO AFFIDAVIT OF WILLIAM J. MASON

**Cost Opinion
for
Stormwater Outfall Disconnect to
Pioneer Irrigation District Facilities**

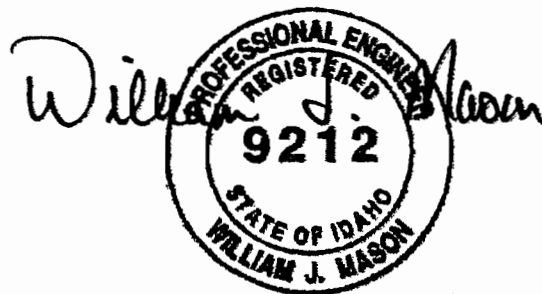
**Client: Pioneer Irrigation District
3804 Lake Avenue
Caldwell, ID 83605**



Professional Engineers, Land Surveyors and Planners
314 Badiola St. Caldwell, ID 83605
Ph (208) 454-0256 Fax (208) 454-0979

Job No. MY1108

Date: September 15, 2009



September 15, 2009

OPINION OF COSTS

Project **Alternative A: Storm Drain Discharge Removal**
Client **Pioneer Irrigation District**
Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE A: STORM DRAIN DISCHARGE REMOVAL	
Location	Total
Aviation (A-15 & A-17)	\$18,943.00
Muller (5-2)	\$2,640.00
Syringa (5-10)	\$3,986.00
10th (B-1)	\$4,664.00
	\$30,233.00

OPINION OF COSTS

Project **Alternative B: Storm Drain Discharge Plugging and Abandonment**

ALTERNATIVE B: STORM DRAIN DISCHARGE PLUGGING AND ABANDONMENT	
Location	Total
Aviation (A-15 & A-17)	\$6,080.00
Muller (5-2)	\$3,141.00
Syringa (5-10)	\$3,141.00
10th (B-1)	\$5,280.00
	\$17,642.00

OPINION OF COSTS

Project **Alternative A: Aviation Way Storm Drain Discharge Removal**
 Client **Pioneer Irrigation District**
 Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE A: STORM DRAIN DISCHARGE REMOVAL (A-15)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$1,500.00	\$1,500.00
Install silt fence	50	lf	\$0.92	\$46.00
Dewatering	2	day	\$1,190.25	\$2,380.50
Remove and replace pole fence	24	lf	\$18.60	\$446.40
Excavation	15	cy	\$5.90	\$88.50
Remove 12" diameter concrete pipe	16	lf	\$9.00	\$144.00
Plug hole in sand and grease trap	1	ea	\$300.00	\$300.00
Metal pipe disposal	1	ea	\$110.00	\$110.00
Fill material haul	8	cy	\$5.20	\$41.60
Backfill compaction	15	cy	\$42.65	\$639.75
Spinkler repair	1	ea	\$122.50	\$122.50
Sod (less than 1000 s.f.)	1	ea	\$815.00	\$815.00
Administration including permits	1	ea	22% of cost	\$1,644.34
			Subtotal =	\$9,118.59

ALTERNATIVE A: STORM DRAIN DISCHARGE REMOVAL (A-17)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$1,500.00	\$1,500.00
Install silt fence	100	lf	\$0.92	\$92.00
Dewatering	2	day	\$1,190.25	\$2,380.50
Remove and replace pole fence	32	lf	\$18.60	\$595.20
Excavation	25	cy	\$5.90	\$147.50
Remove 12" diameter concrete pipe	26	lf	\$9.00	\$234.00
Plug hole in sand and grease trap	1	ea	\$300.00	\$300.00
Metal pipe disposal	1	ea	\$110.00	\$110.00
Fill material haul	8	cy	\$5.20	\$41.60
Backfill compaction	25	cy	\$42.65	\$1,066.25
Spinkler repair	1	ea	\$122.50	\$122.50
Sod (less than 1000 s.f.)	1	ea	\$815.00	\$815.00
Administration including permits	1	ea	22% of cost	\$1,813.80
			Subtotal =	\$10,058.35

Alternative A: Construction Subtotal = \$19,176.94
 10% Contingency = \$1,917.69
 City Cost Factor = 89.8
Alternative A: Construction Total = \$18,943

OPINION OF COSTS

Project **Alternative B: Aviation Way Storm Drain Discharge Plugging and Abandonment**
 Client **Pioneer Irrigation District**
 Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE B: STORM DRAIN DISCHARGE PIPE ABANDONMENT (A-15)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$250.00	\$250.00
Cellular grout pipe abandonment	16	lf	\$50.00	\$800.00
Administration including permits	1	ea	22% of cost	\$415.80
			Subtotal =	\$2,305.80

ALTERNATIVE B: STORM DRAIN DISCHARGE REMOVAL (A-17)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$500.00	\$500.00
Cellular grout pipe abandonment	26	lf	\$50.00	\$1,300.00
Administration including permits	1	ea	22% of cost	\$580.80
			Subtotal =	\$3,220.80

Alternative B: Construction Subtotal = \$5,526.60
10% Contingency = \$552.66
Alternative B: Construction Total = \$6,080

OPINION OF COSTS

Project **Alternative A: Muller Way Storm Drain Discharge Removal**
 Client **Pioneer Irrigation District**
 Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE A: STORM DRAIN DISCHARGE REMOVAL (5-2)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Road Closure	1	ea	\$500.00	\$500.00
Install silt fence	30	lf	\$0.92	\$27.60
Excavation	10	cy	\$5.90	\$59.00
Remove 18" diameter metal pipe	20	lf	\$4.28	\$85.60
Cellular grout pipe abandonment	10	lf	\$10.00	\$100.00
Metal pipe disposal	1	ea	\$110.00	\$110.00
Fill material haul	8	cy	\$5.20	\$41.60
Backfill compaction	10	cy	\$42.65	\$426.50
Administration including permits	1	ea	22% of cost	\$481.87
			Subtotal =	\$2,672.17

Alternative A: Construction Subtotal = \$2,672.17
 10% Contingency = \$267.22
 City Cost Factor = 89.8
Alternative A: Construction Total = \$2,640

OPINION OF COSTS

Project **Alternative B: Muller Way Storm Drain Discharge Plugging and Abandonment**
Client **Pioneer Irrigation District**
Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE B: STORM DRAIN DISCHARGE REMOVAL (5-2)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$500.00	\$500.00
Cellular grout pipe abandonment	20	lf	\$50.00	\$1,000.00
Administration including permits	1	ea	22% of cost	\$514.80
			Subtotal =	\$2,854.80

Alternative B: Construction Subtotal = \$2,854.80
10% Contingency= \$285.48
Alternative B: Construction Total= **\$3,141**

OPINION OF COSTS

Project **Alternative A: Syringa Lane Storm Drain Discharge Removal**
 Client **Pioneer Irrigation District**
 Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE A: STORM DRAIN DISCHARGE REMOVAL (5-10)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Road closure	1	ea	\$500.00	\$500.00
Install silt fence	60	lf	\$0.92	\$55.20
Remove sidewalk	18	sy	\$9.85	\$177.30
Excavation	10	cy	\$5.90	\$59.00
Remove 12" diameter PVC pipe	20	lf	\$4.38	\$87.60
Cellular grout pipe abandonment	10	lf	\$10.00	\$100.00
Manhole and PVC pipe disposal	1	ea	\$250.00	\$250.00
Fill material haul	10	cy	\$5.20	\$52.00
Backfill compaction	10	cy	\$42.65	\$426.50
Compacted 3/4" minus sidewalk base	18	sy	\$10.50	\$189.00
5-foot concrete sidewalk 4" thick	150	sf	\$4.92	\$738.00
Administration including permits	1	ea	22% of cost	\$560.47
			Subtotal =	\$4,035.07

Alternative A: Construction Subtotal = \$4,035.07
 10% Contingency= \$403.51
 City Cost Factor= 89.8
Alternative A: Construction Total= \$3,986

OPINION OF COSTS

Project **Alternative B: Syringa Lane Storm Drain Discharge Plugging and Abandonment**
Client **Pioneer Irrigation District**
Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE B: STORM DRAIN DISCHARGE REMOVAL (5-10)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$500.00	\$500.00
Cellular grout pipe abandonment	20	lf	\$50.00	\$1,000.00
Administration including permits	1	ea	22% of cost	\$514.80
			Subtotal =	\$2,854.80

Alternative B: Construction Subtotal = \$2,854.80
10% Contingency= \$285.48
Alternative B: Construction Total= \$3,141

OPINION OF COSTS

Project **Alternative A: 10th Avenue Storm Drain Discharge Removal**
 Client **Pioneer Irrigation District**
 Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE A: STORM DRAIN DISCHARGE REMOVAL (B-1)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$1,500.00	\$1,500.00
Install silt fence	90	lf	\$0.92	\$82.80
Excavation	15	cy	\$5.90	\$88.50
Remove 18" diameter metal pipe	10	lf	\$4.28	\$42.80
Remove 12" diameter HDPE pipe	30	lf	\$4.38	\$131.40
Cellular grout pipe abandonment	1	ea	\$300.00	\$300.00
Pipe disposal	1	ea	\$110.00	\$110.00
Fill material haul	8	cy	\$5.20	\$41.60
Backfill compaction	15	cy	\$42.65	\$639.75
Administration including permits	1	ea	25% of cost	\$944.21
			Subtotal =	\$4,721.06

Alternative A: Construction Subtotal = \$4,721.06
 10% Contingency= \$472.11
 City Cost Factor= 89.8
Alternative A: Construction Total = \$4,664

OPINION OF COSTS

Project **Alternative B: 10th Avenue Storm Drain Discharge Plugging and Abandonment**
Client **Pioneer Irrigation District**
Job No. **MY1108**

This opinion of cost contained herein is based upon anticipated items disturbed during removal of the subject storm drainage discharge piping. Said costs are expected to change as the final improvement plans are completed and approved. Cost information contained herein is based upon the RSMeans Construction Cost Data 2009, corrected for Boise Idaho and personal experience.

ALTERNATIVE B: STORM DRAIN DISCHARGE REMOVAL (B-1)				
Item	Quantity	Unit	Unit Cost	Total
Mobilization & demobilization	1	ea	\$840.00	\$840.00
Traffic control	1	ea	\$1,500.00	\$1,500.00
Cellular grout pipe abandonment	30	lf	\$50.00	\$1,500.00
Administration including permits	1	ea	25% of cost	\$960.00
			Subtotal =	\$4,800.00

Alternative B: Construction Subtotal = \$4,800.00
10% Contingency = \$480.00
Alternative B: Construction Total = \$5,280

Scott L. Campbell, ISB No. 2251
Bradley J Williams, ISB No. 4019
Tara Martens, ISB No. 5773
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
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Telephone (208) 345-2000
Facsimile (208) 385-5384
18946.0059

Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

FILED
A.M. 4:08 P.M.

SEP 15 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**AFFIDAVIT OF R. SCOTT STANFIELD IN
SUPPORT OF PIONEER IRRIGATION
DISTRICT'S RESPONSE IN OPPOSITION TO
CITY OF CALDWELL'S SECOND MOTION
FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Canyon)

R. Scott Stanfield, having been duly sworn upon oath, deposes and states as follows:

1. I am over the age of 18 years, and make this affidavit based upon my personal knowledge.
2. I am a principal in the Caldwell, Idaho-based engineering and design services firm of Mason Stanfield. As a member of the Caldwell-area engineering and design community, I am familiar with both Pioneer Irrigation District's ("Pioneer") "zero discharge" policy regarding the discharge of municipal stormwater to irrigation facilities it owns, operates or maintains (*i.e.*, the fact that Pioneer prohibits such discharges), and the City of Caldwell's ("City") stormwater policy which more or less requires the discharge of municipal stormwater to local irrigation facilities (including those owned, operated or maintained by Pioneer).
3. I have pointed out and discussed the inherent conflict between the zero discharge policy of Pioneer and the mandatory discharge policy of City with City personnel on various occasions. For example, on or about December 23, 2005, I, along with colleagues Will Mason and Chris Hopper, provided a written memorandum to Mike Piechowski (a member of City's Engineering Department) discussing, in part, our dissatisfaction with the City's discharge policy and the reasons therefor. Attached hereto as Exhibit A, is a true and correct copy of that December 23, 2005 memorandum. Among issues raised in the memorandum was the fact that City was placing the development community in an "impossible" position given that neither Pioneer nor the Bureau of Reclamation (the two entities or jurisdictions who control many of the irrigation facilities in the Caldwell area) accept post-developed/municipal stormwater discharges

to their respective irrigation facilities. The concerns expressed in the memorandum were met with silence.

4. I again voiced my concerns over the conflict that the City's mandatory discharge requirement presented at a Caldwell City Council Meeting on or about May 1, 2006. In short, my testimony at said meeting addressed two concerns regarding City's proposed stormwater manual: (1) that the proposed manual directly conflicted with Pioneer's "zero discharge" urban stormwater policy, and (2) that the manual improperly vested too much power or decision-making authority in the City Engineer. With respect to the proposed manual's direct conflict with Pioneer's policies, I explained that City's proposed stormwater management manual unfairly put the development and design community in between a "rock and a rock"; between Pioneer's "zero discharge" policy and City's mandatory discharge policy. My "decision-making"-based commentary raised my concerns that the type and extent of decision-making authority afforded the City Engineer under the proposed manual was too great; that the manual should provide some City Council or mayoral oversight. Though my comments were not met with silence, Mayor Nancolas and members of the City Council informed me that I and my colleague Chris Hopper (who was also present at the meeting) were the only ones who opposed the proposed manual, and that City did not see any problem with its mandatory discharge requirement. In sum, it was my impression that my commentary, as well as that of Mr Hopper, in opposition to the City's proposed manual was summarily dismissed by the Mayor and Council.

5. I also voiced concerns over the City's mandatory stormwater discharge requirement in conjunction with both the Montecito Park and Windsor Creek Subdivisions. Discussion of the events and issues involving the design and construction of the Montecito Park

Subdivision can be found in my previous affidavit, dated August 20, 2009. With respect to the design and construction of the Windsor Creek Subdivision, I and Chris Hopper met with City Engineer Gordon Law over concerns that the development was being delayed as a result of the conflict between Pioneer's zero discharge policy and City's mandatory discharge policy. Mr. Hopper and I originally designed the subdivision to contain retention only stormwater facilities consistent with Pioneer's "zero discharge" policy. I felt that City was withholding its approval of the retention-based design, and thereby delaying progress on the project, due to its mandatory discharge requirement. During our meeting, Mr. Law suggested a potential solution for the apparent impasse—the presentation of one set of design plans to Pioneer showing no or zero municipal stormwater discharge to its facilities, and the presentation of a different set of plans to City providing for the discharge of the municipal stormwater generated by the development to Pioneer's facilities. Mr. Law represented that both City and the Pioneer Board of Directors had approved of this approach, an approach which would allow each entity to issue their respective approvals in accordance with their respective, albeit, conflicting policies. I informed Mr. Law that I was exceedingly skeptical of Pioneer's alleged acquiescence to such a proposal, given that Pioneer had never informed me of such an agreement. Moreover, other engineering design professionals with whom I worked and inquired of in the Caldwell community were likewise not informed of any such position by Pioneer personnel.

6. No matter the development project I worked on, City design reviewers constantly told me that I had to discharge municipal stormwater to local irrigation facilities. Whenever I designed a retention-based system after adoption of the City's emergency stormwater ordinance in Spring 2006 (which ordinance later became permanent in September 2006), that design was rejected with the requirement that the projects discharge the

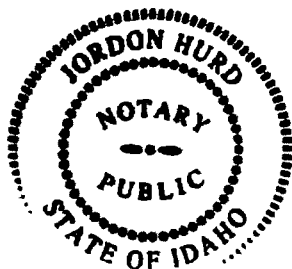
stormwater off-site. I would repeatedly argue against the required discharge, and the design reviewers would simply respond that their "hands were tied," and that I would have to discuss the matter directly with Mr. Law. Unfortunately, Mr. Law rarely, if ever, would take my phone calls. Mr. Law's assistant, Tammy Franz, would ask me what it was that I needed to meet with Mr. Law about, and I would tell her that I needed to meet with him regarding City's mandatory stormwater discharge requirement. It got to the point where Ms. Franz would simply respond that Mr. Law would not agree to meet with us regarding that subject. Mr. Law's lack of accessibility and lack of willingness to discuss the matter was very frustrating. While City's stormwater management manual permitted the design of retention-based stormwater management systems in theory, City would not approve the design or construction of such systems in practice.

Further your affiant sayeth naught.

R. Scott Stanfield

R. Scott Stanfield

SUBSCRIBED AND SWORN to before me this 14 day of September, 2009.



Jordan Hurd

NOTARY PUBLIC FOR IDAHO

Residing at 2008 Wildflower Drive Nampa Id

My Commission Expires Sep. 23, 2014

CERTIFICATE OF SERVICE

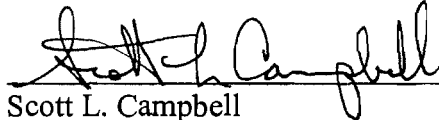
I HEREBY CERTIFY that on this 15th day of September, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF R. SCOTT STANFIELD IN SUPPORT OF PIONEER IRRIGATION DISTRICT'S RESPONSE IN OPPOSITION TO CITY OF CALDWELL'S SECOND MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Mark Hilty
HAMILTON MICHAELSON & HILTY LLP
1301 12th Avenue
P.O. Box 65
Nampa, ID 83653-0065
Fax: 467-3058

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile

J. Fredrick Mack
Erik F. Stidham
HOLLAND & HART LLP
101 South Capitol Boulevard, Suite 1400
Post Office Box 2527
Boise, ID 83701-2527
Fax: 343-8869

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ Facsimile



Scott L. Campbell

EXHIBIT A

TO AFFIDAVIT OF R. SCOTT STANFIELD

EARL, MASON AND STANFIELD, INC.

PROFESSIONAL ENGINEERS, LAND SURVEYORS & PLANNERS
314 BADIOLA STREET
CALDWELL, IDAHO 83605

TELEPHONE: (208) 454-0256
FAX: (208) 454-0979
Email: sstanfield@emands.net

TO: Mike Piechowski, P.E.

Cc: Pioneer Irrigation District
United States Bureau of Reclamation

FROM: Scott Stanfield, P.E.
William Mason, P.E.
Chris Hopper, P.E.

DATE: December 23, 2005

RE: Proposed Caldwell Stormwater Policy revisions

We have reviewed the proposed Stormwater Policy. Please see the attached redlined comments.

Generally speaking, we disagree with the City's approach. You explained to us that several reasons for the changes are plugging of infiltration surfaces by sediment and organics, irrigation overspray and the existence of confining layers. In our professional opinion, several of the proposed changes, specifically the extreme over-sizing of retention facilities (directly and indirectly as a result of the proposed requirements) will not solve the problem. The over-sizing will not minimize the plugging of infiltration surfaces nor will it reduce the irrigation over-spray (by the homeowner's). Also, it will not address the issue of existing confining layers. Rather than correcting the apparent failure of the system, the over-sizing will simply delay the problem and increase its magnitude. Other methodologies are available to address the problems as presented by the City.

Additionally, the proposed changes appear to *require* that systems utilize any existing natural runoff discharges. This will create a situation that cannot be solved by the engineer or the land owner. For example, if an existing offsite facility requires upgrades to accept the post-developed runoff, the adjoining land owner is not required by law to allow someone to trespass and upgrade the system. Additionally, the two jurisdictions that control many existing drainage facilities in and around the City's limits are the United States Bureau of Reclamation (USBR) and the Pioneer Irrigation District (PID). Neither PID nor USBR will accept post-developed storm water discharge into their existing facilities. This conflicts directly with the City's proposed changes. The proposed requirement will be impossible to adhere to. If an impossible condition is placed upon a land owner, at what stage does it constitute a governmental "taking"? To avoid costly legal battles, we strongly recommend the City discuss the situation with the USBR and PID and not place this un-obtainable requirement upon the landowner and the engineer.

We are also concerned about the lack of time provided to respond to the proposal. Several groups have expressed concerns to us, but due to the Christmas holiday, they might not be able to respond by January 1, 2006. We request the City schedule a work shop to review the policy changes prior to sending the document to P&Z and the Council.

PID057358

Mark Hilty, ISB #5282
Aaron Seable, ISB #7191
HAMILTON, MICHAELSON & HILTY, LLP
1303 12th Avenue Road
P.O. Box 65
Nampa, Idaho 83653-0065
Telephone: (208) 467-4479
Facsimile: (208) 467-3058

 **ORIGINAL**

F I L E D
A.M. 4:55 P.M.

SEP 23 2009

CANYON COUNTY CLERK
T EARLS, DEPUTY

Erik F. Stidham, ISB #5483
Scott E. Randolph, ISB #6768
HOLLAND & HART LLP
Suite 1400, U.S. Bank Plaza
101 South Capitol Boulevard
P.O. Box 2527
Boise, Idaho 83701-2527
Telephone: (208) 342-5000
Facsimile: (208) 343-8869

Attorneys for Defendant/Counterclaimant

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**CITY OF CALDWELL'S THIRD
MOTION FOR SUMMARY
JUDGMENT**

Defendant/Counterclaimant City of Caldwell ("Caldwell") hereby submits this motion for summary judgment pursuant to Idaho Rule of Civil Procedure 56. Caldwell's third motion for summary judgment seeks a ruling on two issues not decided by Caldwell's two prior motions for summary judgment. First, Caldwell seeks a ruling as a matter of law that Pioneer Irrigation District ("PID") has no proof of ownership for any of its claimed facilities. To the extent the Court finds that PID has properly established ownership rights for the facilities that it has identified, Caldwell also seeks a ruling foreclosing PID from identifying any additional facilities for which it claims ownership that it has not previously identified in this litigation. Second, Caldwell seeks a ruling that as a matter of law, there is no basis or reason to believe that PID is exposed to liability under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA") Any potential claim under the CWA is moot based on Caldwell's recently-issued NPDES permit. Caldwell therefore seeks a ruling that PID's concerns regarding CWA liability do not constitute a material or unreasonable interference and are not valid bases for PID's trespass and nuisance claims.

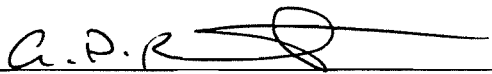
This motion is supported by an accompanying Brief, the Affidavit of A. Dean Bennett, and the record on file in this matter.

Oral argument is requested.

DATED this 23 day of September, 2009.

HOLLAND & HART LLP

By


A Dean Bennett, for the firm
Attorneys for Defendant City of Caldwell

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Scott L. Campbell, Esq.
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, Chartered
P.O. Box 829
Boise, Idaho 83701
Facsimile: (208) 385-5384

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HILTY, LLP
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Nampa, Idaho 83653-0065
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☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy (Fax)



for HOLLAND & HART LLP

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 **ORIGINAL**

F I L E D
A.M. 435 P.M.

Mark Hilty, ISB #5282
Aaron Seable, ISB #7191
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SEP 23 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

Erik F. Stidham, ISB #5483
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Attorneys for Defendant

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

Case No. CV 08-556-C

**AFFIDAVIT OF COUNSEL IN
SUPPORT OF MOTION FOR
THIRD SUMMARY JUDGMENT**

CITY OF CALDWELL,

Counterclaimant,

-vs-

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

**AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR THIRD SUMMARY
JUDGMENT - 1**

1675

STATE OF IDAHO)
)ss.
COUNTY OF ADA)

A. DEAN BENNETT, first being duly sworn on oath, states and affirms as follows:

1. Your affiant is an attorney in the Boise office of the law firm of Holland & Hart LLP and is licensed to practice law in the State of Idaho. I am an attorney on behalf of Defendant/Counterclaimant City of Caldwell ("Caldwell") in this matter. I make this affidavit in support of its Third Motion for Summary Judgment.

2. Attached hereto as Exhibit A is a true and correct copy of Interrogatory No. 3 of City of Caldwell's First Set of Discovery Requests to Plaintiff Pioneer Irrigation District.

3. Attached hereto as Exhibit B is a true and correct copy of Answer to Interrogatory No. 3 from Plaintiff Pioneer Irrigation Districts' Answers and Responses to City of Caldwell's First Set of Discovery Requests.

4. Attached hereto as Exhibit C is a true and correct copy of excerpts from the deposition of Jeff Scott.

5. Attached hereto as Exhibit D is a true and correct copy of excerpts from the deposition of PID's Rule 30(b)(6) deponent Mark Zirschky.

6. Attached hereto as Exhibit E is a true and correct copy of Response to Request for Admission Nos. 11-15 from Plaintiff Pioneer Irrigation District's Answer and Responses to City of Caldwell's Second Set of Discovery Requests.

7. Attached hereto as Exhibit F is a true and correct copy of the September 4, 2009 EPA National Pollution Discharge Elimination System ("NPDES") permit issued to City of Caldwell.

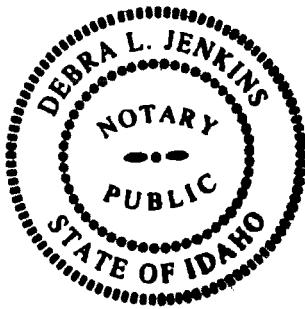
8. Attached hereto as Exhibit G is a true and correct copy of Response to Comments on Proposed Permit dated September 2009.

9. Attached hereto as Exhibit H is a true and correct copy of a letter from Director of the Office of Wastewater Management Environmental Protection Agency dated July 20, 2007 to Director of Ada County Highway District.

Dated this 23 day of September, 2009.

A. D. R.
A. Dean Bennett

SUBSCRIBED and SWORN to before me this 23rd day of September, 2009.



Debra Jenkins
Notary Public for Idaho
Residing at: Boise Meridian ID
My Commission Expires: 5-15-15

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Scott L. Campbell
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for HOLLAND & HART LLP

4619455_1.DOC

EXHIBIT A

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Attorneys for Defendant

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

PIONEER IRRIGATION DISTRICT,)
)
Plaintiff,)
)
-vs-)
)
CITY OF CALDWELL,)
)
Defendant.)
)

Case No. CV 08-556-C

**CITY OF CALDWELL'S FIRST
SET OF DISCOVERY REQUESTS
TO PLAINTIFF PIONEER
IRRIGATION DISTRICT**

CITY OF CALDWELL,)
)
Counterclaimant,)
)
-vs-)
)
PIONEER IRRIGATION DISTRICT,)
)
Counterdefendant.)
)

REQUEST FOR PRODUCTION NO. 43: All Documents that evidence, refer, or relate to Pioneer's practices, procedures or policies requiring third parties to pay Pioneer's attorney or engineer, or reimburse Pioneer for attorney or engineer fees.

REQUEST FOR PRODUCTION NO. 44: All Documents that evidence, refer, or relate to Pioneer's practices, procedures, policies or construction standards for the construction and maintenance of structures within Pioneer's facilities.

VI. INTERROGATORIES

INTERROGATORY NO. 1: If Your answer to any of the Requests for Admission propounded below is anything other than an unqualified admission, state in reasonable detail the basis for Your denial.

INTERROGATORY NO. 2: Do You contend that Caldwell has no right to discharge drainage water into Pioneer's facilities? If so, please fully describe all bases for that contention.

INTERROGATORY NO. 3: Please identify all canals, laterals, and ditches owned or operated by Pioneer, including the name, point of origin, and ending point of each canal, lateral, and ditch.

INTERROGATORY NO. 4: Identify each and every source of drainage currently discharging drainage water into Pioneer's facilities. As part of Your answer, please state who installed the inlet or pipe, who owns the inlet or pipe, when it was installed, the location and size of the inlet or pipe, what type of water is discharged through the inlet or pipe (for example, storm water, irrigation return water, or a combination of the two), and whether You granted express permission for the installation of the inlet or pipe.

EXHIBIT B

Scott L. Campbell, ISB No. 2251
Tara Martens, ISB No. 5773
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Attorneys for Plaintiff / Counterdefendant
Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**PLAINTIFF PIONEER IRRIGATION
DISTRICT'S ANSWERS AND RESPONSES TO
CITY OF CALDWELL'S FIRST SET OF
DISCOVERY REQUESTS**

which are artificially created and maintained by surface irrigation practices both throughout the district, and as a consequence of irrigation practices up gradient of the district.

Pioneer does not separately assess its landowners for benefits derived from its drainage infrastructure. Instead, drainage costs are treated as facility operation and maintenance costs because the drainage function Pioneer performs is performed solely to foster the continued cultivation and irrigation of the lands within the district.

The right to discharge irrigation return flow water into Pioneer facilities does not include, and has never included, the discharge of artificially collected and channeled urban storm water runoff. Regarding the drainage or discharge of storm water flows to or through Pioneer facilities specifically, that drainage is limited to incidental sheet flows created by precipitation events that overwhelm the infiltration rates of neighboring lands, or increases in the shallow ground water table driven by storm water infiltration.

As a landowner within the boundaries of Pioneer Irrigation District, the City of Caldwell is entitled to the same agricultural irrigation return flow and diffuse storm water drainage rights enjoyed by any other landowner within the District.

INTERROGATORY NO. 3: Please identify all canals, laterals, and ditches owned or operated by Pioneer, including the name, point of origin, and ending point of each canal, lateral, and ditch.

ANSWER TO INTERROGATORY NO. 3: Please see document entitled "Canals/Ditches in Pioneer Irrigation" attached hereto.

INTERROGATORY NO. 4: Identify each and every source of drainage currently discharging drainage water into Pioneer's facilities. As part of Your answer, please state who installed the inlet or pipe, who owns the inlet or pipe, when it was installed, the location and size

Canals/Ditches in Pioneer Irrigation

Starting and ending locations are Section-Range-Township

Canal/Ditch Name	Starting Location	Ending Location
100 Lateral	28-4N-2W	19-4N-2W
10 th Street Lateral	34-4N-3W	28-4N-3W
11.6 Lateral	14-3N-2W	11-3N-2W
13.3 Center Lateral	9-3N-2W	32-4N-2W
15.3 North Branch	8-3N-2W	6-3N-2W
15.6 South Branch	8-3N-2W	6-3N-2W
Stevens Lateral	20-3N-2W	7-3N-2W
Stevens West Lateral	18-3N-2W	18-3N-2W
Stone Lateral	19-3N-2W	12-3N-3W
College Lateral	35-4N-3W	27-4N-3W
200 Lateral	29-4N-2W	19-4N-2W
McCarthy Lateral	19-3N-2W	13-3N-3W
Lonkey Lateral	11-3N-3W	2-3N-3W
Fenton Lateral	14-3N-3W	13-3N-3W
Mesler Lateral	10-3N-3W	3-3N-3W
Mesler East Lateral	10-3N-3W	3-3N-3W
Douglas Lateral	33-4N-3W	34-4N-3W
Torbett Lateral	33-4N-3W	28-4N-3W
300 Lateral	At the section corner for sections 30/29/32/31 – 4N-2W	24-4N-3W
Fisher Lateral	31-4N-3W	30-4N-3W
Pipe Gulch East	22-4N-4W	22-4N-4W
Pipe Gulch West	22-4N-4W	22-4N-4W
Sommers Lateral	19-4N-1W	19-4N-1W
400 Lateral	31-4N-3W	24-4N-3W
Railroad Lateral	6-3N-2W	35-4N-3W
5.17 Lateral	30-4N-1W	23-2N-2W
5.3 Lateral	30-4N-1W	22-2N-2W
5.5 Lateral	30-4N-1W	27-4N-2W
Lowline	12-3N-3W	28-4N-3W
500 Lateral	31-4N-2W	23-4N-3W
Jester 3.5	34-4N-3W	34-4N-3W
King Lateral	33-4N-3W	28-4N-3W
6.0 Lateral	31-4N-2W	31-4N-2W
6.6 Lateral	31-4N-1W	31-4N-1W
Kimball West	33-4N-3W	28-4N-3W
6 th St. Lateral	22-3N-2W	16-3N-2W
7.0 Lateral	31-4N-1W	31-4N-1W
8.26 Lateral	6-3N-2W	28-4N-2W
9.8 Lateral	12-3N-2W	3-3N-2W
9.8 North Branch	11-3N-2W	3-3N-2W
9.8 South Branch	11-3N-2W	3-3N-2W
Frazier Lateral	3-3N-2W	4-3N-2W

Canal/Ditch Name	Starting Location	Ending Location
Garber Lateral	4-3N-2W	3-3N-2W
Highline	19-4N-2W	1-3N-3W
Phyllis	24-4N-1W	27-4N-4W
Mason Creek Feeder	33-4N-2W	29-4N-2W
Shelp Lateral	36-4N-4W	25-4N-4W
Stockyard Lateral	36-4N-3W	36-4N-3W
Whittig Lateral	36-4N-4W	25-4N-4W
11.5 Lateral	11-3N-2W	11-3N-2W
13.3 East Lateral	15-3N-2W	32-4N-2W
13.3 West Lateral	9-3N-2W	31-4N-2W
13.3 Lateral	22-3N-2W	16-3N-2W
15.0 Lateral	21-3N-2W	1-3N-3W
Hatfield Lateral	21-3N-2W	20-3N-2W
Stevens North Lateral	19-3N-2W	18-3N-2W
Stevens South Lateral	18-3N-2W	18-3N-2W
Stone Lateral	19-3N-2W	12-3N-3W
25.1 Lateral	14-3N-3W	34-4N-3W
Villanue Lateral	8-3N-2W	5-3N-2W
Groves (8.26) Lateral	33-4N-2W	28-4N-2W
Miller (8.26)	34-4N-2W	28-4N-2W
A Drain	25-4N-3W	Ends outside the district – leaves PID at 23-4N-3W
B Drain	34-4N-3W	34-4N-3W
C Drain	33-4N-3W	28-4N-3W
Bardsley Gulch Drain	33-4N-3W	29-4N-3W
D Drain	32-4N-3W	29-4N-3W
E Drain	31-4N-3W	30-4N-3W
Shelp Drain	25-4N-4W	25-4N-4W
Dickins Drain	25-4N-4W	24-4N-4W
Corning Drain	26-4N-4W	23-4N-4W
Street Drain	26-4N-4W	23-4N-4W
Bruno Lateral	16-3N-2W	17-3N-2W
Peterson	11-3N-3W	Ends on the line between 11-3N-3W and 2-3N-3W
Smiley Lateral	31-4N-3W	30-4N-3W
Wilde Lateral	20-3N-2W	Ends on the line between 20-3N-2W and 17-3N-2W
Cowling	33-4N-3W	33-4N-3W
Hitchcock	2-4N-3W	Ends at the line between 2- 4N-3W and 29-4N-3W
Steelman	3-3N-3W	34-4N-3W

EXHIBIT C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION)
DISTRICT,)

) Case No. CV 08-556-C
Plaintiff,)

vs.)

CITY OF CALDWELL,)

)
Defendant)

)
CITY OF CALDWELL,)

)
Counterclaimant,)

vs.)

)
PIONEER IRRIGATION)
DISTRICT,)

)
Counterdefendant)

VIDEOTAPED DEPOSITION OF JEFFREY SCOTT
April 15, 2009
Boise, Idaho

Susan L. Sims, CSR No. 739

45 . 9/8/2003 Case Management Report 106
COC098061-COC098066 (6 pages)
46 . 11/13/2003 letter to Gordon Law from 106
Deborah Long and attached Case Management
Report (9 pages)
47 . 9/8/2004 letter to Gordon Law from 106
Deborah Long and attached Case Management
Report (11 pages)
48 . 6/25/2004 letter to Gordon Law from 106
Deborah Long and attached Case Management
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49 . 9/30/2005 letter to City of Caldwell from 137
Jeff Scott EPID024912-EPID024914 (3 pages)
50 . 8/22/2007 letter to Canyon County 138
Development Services Department from
Jeff Scott EPID025751-EPID025754 (4 pages)
51 . 4/10/2006 letter by Naida Kelleher 209
COC002794-COC002800 (7 pages)
52 . Pioneer Irrigation District Discharge Point 231

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VIDEOTAPED DEPOSITION OF JEFFREY SCOTT

BE IT REMEMBERED that the videotaped deposition
of JEFFREY SCOTT was taken by the attorney for the
Defendant at the offices of Holland & Hart, located at
101 S. Capitol Blvd., Suite 1400, Boise, Idaho, before
Susan L. Sims, a Court Reporter (Idaho Certified
Shorthand Reporter No. 739) and Notary Public in and
for the County of Ada, State of Idaho, on Wednesday,
the 15th day of April, 2009, commencing at the hour of
9:11 a.m. in the above-entitled matter.

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Also present: Ron Garnys, Videographer

Page 2

PROCEEDINGS

1
2
3 MR. STIDHAM: My name is Erik Stidham.
4 I'm a member of the firm of Holland & Hart. I
5 represent the City of Caldwell in the matter of
6 Pioneer Irrigation District v. City of Caldwell,
7 Case No. CV 08-556-C.

8 The deposition is being made on behalf
9 of Defendant City of Caldwell. The deposition is
10 being video tape-recorded by Ron Garnys, who is
11 an associate of the John Glenn Hall Company,
12 whose business address is Post Office Box 2683,
13 Boise, Idaho.

14 Today's date is April 15th. The time
15 is approximately 9:12. The location of the
16 deposition is Holland & Hart Boise office. The
17 deponent's name is Mr. Jeff Scott.

18 Would other counsel please identify
19 themselves?

20 MR. CAMPBELL: Scott Campbell with the
21 firm of Moffatt Thomas. I represent Pioneer
22 Irrigation District.

23 MR. STIDHAM: Would you please swear
24 the witness.

25 ///

Page 4

1 (Pages 1 to 4)

<p>1 A No, not off the top of my head.</p> <p>2 Q Any other unauthorized discharge</p> <p>3 points beyond the one we've been discussing here</p> <p>4 at 10th Avenue that you can recall coming to</p> <p>5 Pioneer's attention during the entire time period</p> <p>6 that you've been a Pioneer employee?</p> <p>7 MR. CAMPBELL: Objection, calls for a</p> <p>8 legal conclusion.</p> <p>9 THE WITNESS: I'd say yes.</p> <p>10 Q (BY MR. STIDHAM) Okay. What were</p> <p>11 those?</p> <p>12 MR. CAMPBELL: Same objection.</p> <p>13 THE WITNESS: The A drain.</p> <p>14 Q (BY MR. STIDHAM) Okay. Before I</p> <p>15 forget, is the B drain a facility that Pioneer</p> <p>16 claims that it owns?</p> <p>17 A Yes.</p> <p>18 Q You said there was one in the A drain</p> <p>19 that you recall?</p> <p>20 A Yes.</p> <p>21 Q Where was that?</p> <p>22 A It would be south of 2026.</p> <p>23 Q When was this discharge point</p> <p>24 identified by Pioneer?</p> <p>25 MR. CAMPBELL: Objection as to</p> <p style="text-align: right;">Page 65</p>	<p>1 MR. CAMPBELL: Objection -- sorry, are</p> <p>2 you finished?</p> <p>3 MR. STIDHAM: Go ahead, yeah.</p> <p>4 MR. CAMPBELL: Objection, calls for a</p> <p>5 legal conclusion. And also this is not a</p> <p>6 30(b)(6) deponent. If you can answer the</p> <p>7 question, go ahead.</p> <p>8 THE WITNESS: Can you ask that again?</p> <p>9 MR. STIDHAM: Sure. And, Scott, if</p> <p>10 you just want a standing objection that he's not</p> <p>11 a 30(b)(6) deponent, you're welcome to it.</p> <p>12 MR. CAMPBELL: Okay. Let's go ahead</p> <p>13 and do that then. And also with regard to</p> <p>14 unauthorized being objectionable on the basis</p> <p>15 that it's a legal conclusion, that way I won't</p> <p>16 have to continue to object.</p> <p>17 MR. STIDHAM: Sure. That's fair.</p> <p>18 Q (BY MR. STIDHAM) So to the best of</p> <p>19 your recollection sometime around 2002, Pioneer</p> <p>20 identified a discharge point that it contends was</p> <p>21 unauthorized somewhere around the 2026; is that</p> <p>22 correct.</p> <p>23 A Yes.</p> <p>24 Q What happened? How was this</p> <p>25 identified, best of your recollection, this</p> <p style="text-align: right;">Page 67</p>
<p>1 30(b)(6).</p> <p>2 THE WITNESS: I can't recall.</p> <p>3 Q (BY MR. STIDHAM) Can you estimate the</p> <p>4 time frame for me?</p> <p>5 A I'd be guessing.</p> <p>6 Q Well, I don't want you to guess. Can</p> <p>7 you tell me whether it was after you took over as</p> <p>8 superintendent?</p> <p>9 A I'd be guessing before, before I was</p> <p>10 superintendent.</p> <p>11 Q What about after was it identified --</p> <p>12 excuse me, after you became assistant</p> <p>13 superintendent?</p> <p>14 A Yes.</p> <p>15 Q And again, you became assistant</p> <p>16 superintendent, if I recall correctly, in around</p> <p>17 2002?</p> <p>18 A Correct.</p> <p>19 Q Okay. So best of your recollection,</p> <p>20 sometime after approximately 2002, Pioneer</p> <p>21 identified a discharge point that it contends was</p> <p>22 unauthorized somewhere around the 2026?</p> <p>23 MR. CAMPBELL: Objection.</p> <p>24 Q (BY MR. STIDHAM) Is that correct?</p> <p>25 Sorry.</p> <p style="text-align: right;">Page 66</p>	<p>1 discharge point?</p> <p>2 A Visually and -- observing it.</p> <p>3 Q Who identified it?</p> <p>4 A I can't recall.</p> <p>5 Q How did it come to your attention?</p> <p>6 A Seeing water discharge into the A</p> <p>7 drain.</p> <p>8 Q So no one told you about it; you saw</p> <p>9 it yourself for the first time? That's what I'm</p> <p>10 trying to get at, sir.</p> <p>11 A Correct.</p> <p>12 Q Okay. So when you saw this discharge</p> <p>13 point around the 2026 in the A drain, what</p> <p>14 happened next? What did you do?</p> <p>15 A Notified the board.</p> <p>16 Q Okay. How did you notify the board?</p> <p>17 A Phone call.</p> <p>18 Q Okay. Do you recall who was on the</p> <p>19 board at that time?</p> <p>20 A I believe it was Alan Newbill. Boy,</p> <p>21 I'm questioning whether or not Don Sayer was</p> <p>22 still on the board or not, and Leland Earnest.</p> <p>23 Q Okay. What do you recall regarding</p> <p>24 those conversations with the board members</p> <p>25 regarding this discharge point that you</p> <p style="text-align: right;">Page 68</p>

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1 THE WITNESS: Okay.
 2 THE VIDEOGRAPHER: Off the record.
 3 Time is 2:49.
 4 (Break taken from 2:49 p.m. to 3:01 p.m.)
 5 THE VIDEOGRAPHER: Back on the record.
 6 Time is 3:01.
 7 Q (BY MR. STIDHAM) All right.
 8 Mr. Scott, we're back on the record. And let me
 9 just try and sum up what at least I understand to
 10 be the case.
 11 You're responsible for calculating the
 12 capacity of the system, Pioneer's system,
 13 correct?
 14 MR. CAMPBELL: Objection, ambiguous.
 15 THE WITNESS: System?
 16 Q (BY MR. STIDHAM) The facilities that
 17 Pioneer claims, and you're responsible for
 18 calculating the capacity for those facilities,
 19 correct?
 20 MR. CAMPBELL: Objection, ambiguous.
 21 THE WITNESS: I guess I don't -- I
 22 mean, what facilities are you talking about? In
 23 general?
 24 Q (BY MR. STIDHAM) Yeah.
 25 A That's pretty big.

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1 Q Yeah. How about if we'd say systems
 2 used, either canals or drains, okay -- canals,
 3 laterals and drains, okay?
 4 A Okay.
 5 Q Are there any other portions of the
 6 facilities I'm leaving out?
 7 A Canals, laterals, drains. I don't
 8 believe so.
 9 Q Now, it's my understanding that one of
 10 the responsibilities you have is to calculate the
 11 flow capacity for the facilities that Pioneer
 12 either claims ownership in or maintains, correct?
 13 A No.
 14 Q Okay. Who does, if anyone, calculate
 15 the flow capacity for Pioneer's claims
 16 facilities?
 17 A What facilities are you talking about?
 18 Q The different portions of the
 19 facilities. Let me ask you this way, has Pioneer
 20 calculated the flow capacity for its facilities?
 21 MR. CAMPBELL: Objection, ambiguous.
 22 THE WITNESS: Are you talking drain
 23 ditches?
 24 Q (BY MR. STIDHAM) I'm talking all the
 25 facilities.

Page 168

1 A No.
 2 Q Okay. What portions, if any, of
 3 Pioneer's facilities has Pioneer calculated the
 4 flow capacity for?
 5 A The Phyllis Canal, its laterals; the
 6 high line, its laterals; the low line, and its
 7 laterals.
 8 Q Okay. And could you explain to me the
 9 methodology used -- well, first, who at Pioneer
 10 calculated the flow capacity for the Phyllis
 11 Canal?
 12 A I don't know.
 13 Q Okay. Was that calculated before your
 14 time?
 15 A Yes.
 16 Q Is it written down somewhere?
 17 A Yes.
 18 Q Okay. Where is that written down?
 19 A In that sheet.
 20 Q That you keep on your desk?
 21 A Uh-huh.
 22 Q So if I understand it correctly, we
 23 talked about that sheet earlier today?
 24 A Uh-huh.
 25 Q The only calculations that you're

Page 169

1 aware of regarding the flow -- calculations of
 2 flow capacity for Pioneer's facilities are
 3 contained on that one sheet of paper that you
 4 keep on your desk; is that correct?
 5 MR. CAMPBELL: Objection, misstates
 6 his testimony.
 7 THE WITNESS: Yeah, can you rephrase
 8 that?
 9 Q (BY MR. STIDHAM) Sure. Tell me what
 10 you didn't understand about the question.
 11 A I didn't understand, because I heard
 12 an objection, so --
 13 Q Okay. Fair enough.
 14 As I understand it, your testimony is
 15 that the only calculations relating to flow
 16 capacity in Pioneer's facilities that you're
 17 aware of are those that are contained on the one
 18 sheet of paper that you keep under the glass on
 19 your desk; is that correct?
 20 A No.
 21 Q Okay. What other calculations
 22 regarding flow capacity for Pioneer's facilities
 23 are you aware of separate from the calculations
 24 that you keep -- or excuse me, the sheet of paper
 25 you keep on your desk?

43 (Pages 166 to 169)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,)
Plaintiff,) Case No. CV 08-556-C
v.)
CITY OF CALDWELL,)
Defendant.)
CITY OF CALDWELL,)
Counterclaimant,)
v.)
PIONEER IRRIGATION DISTRICT,)
Counterdefendant.)

VIDEOTAPED DEPOSITION OF JEFF SCOTT
VOLUME II (PAGES 236 - 446)

April 27, 2009

Boise, Idaho

Amy E. Simmons, CSR No. 685, RPR, CRR

APPEARANCES (continued):

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Also Present: John Glenn Hall, Videographer

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SCOTT, 4/27/09

VIDEOTAPED DEPOSITION OF JEFF SCOTT

BE IT REMEMBERED that the deposition of JEFF SCOTT was taken by the attorney for the Defendant at the law offices of Holland & Hart, located at 101 S. Capitol Boulevard, Suite 1400, Boise, Idaho, before Amy E. Simmons, a Court Reporter (Idaho Certified Shorthand Reporter No. 685) and Notary Public in and for the County of Ada, State of Idaho, on Monday, the 27th day of April, 2009, commencing at the hour of 9:21 a.m. in the above-entitled matter.

APPEARANCES:

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237 SCOTT, 4/27/09

INDEX EXAMINATION

JEFF SCOTT PAGE

By: Mr. Stidham

EXHIBITS

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53. Set of Color Maps, Bates Nos. PID072193 through PID072457 (265 pages)	254
54. Color Full-Size Map Copy, Bates No. PID 072367 (1 page)	264
55. Meeting Minutes Dated January 7, 2004, Bates Nos. PID068658 and PID068659 (2 pages)	367
56. Excerpt from June 24, 2004, Minutes, Bates Nos. PID068681 through PID068684 (4 pages)	391
57. Excerpt from November 8, 2004, Minutes, Bates Nos. PID068700 through PID068702 (3 pages)	402
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1 (Pages 239 to 242)

<p>1 THE VIDEOGRAPHER: Off the record. 2 (Discussion held off the record.) 3 THE VIDEOGRAPHER: On the record. 4 Q. (BY MR. STIDHAM) So, Mr. Scott, we were off 5 the record for a while. And we're through clarifying 6 what I was struggling to ask. So I'll try again. Okay? 7 A. (Witness nods head.) 8 Q. Okay. I'd like you to identify for me what 9 areas of interface there are in which another entity -- 10 let's just stay with irrigation districts just for now -- 11 other irrigation districts discharge into Pioneer 12 facilities. Okay? 13 A. Um-hmm. 14 Q. Can you identify those for me? 15 A. The facilities? 16 Q. Yes. 17 A. I would say the Phyllis Canal. 18 Q. Okay. And which entity or irrigation district, 19 excuse me, discharges into the Phyllis Canal? 20 A. There is going to be multiple. 21 Q. Okay. 22 A. Starting off with Settlers, they discharge into 23 the Phyllis. 24 Q. Okay. And while we're on Settlers, can you 25 tell me where Settlers discharges into the Phyllis?</p> <p style="text-align: right;">Page 280</p>	<p>1 irrigation districts? 2 A. Not to my knowledge. 3 Q. Okay. We talked about irrigation districts. 4 Any other entities that you're aware of that 5 discharge into facilities that Pioneer claims ownership 6 in? 7 A. City of Nampa. 8 Q. Okay. Where does the City of Nampa discharge? 9 A. Phyllis Canal. 10 Q. Where on the Phyllis Canal? 11 A. Within the boundaries of the City of Nampa. 12 Q. Okay. And are you referring to a number of 13 discharge points? 14 A. Yes. 15 Q. Let me back up, then. With regard to Settlers, 16 are you referring to multiple discharge points there? 17 A. Yes. 18 Q. Okay. And with regard to Nampa-Meridian and 19 Wilder Irrigation, do those irrigation districts also 20 have a number of discharge points in the Phyllis Canal? 21 A. Yes. 22 Q. Okay. So you've identified the City of Nampa. 23 Any other entities? 24 A. City of Caldwell. 25 Q. Okay. And where does the City of Caldwell</p> <p style="text-align: right;">Page 282</p>
<p>1 A. It's going to be up towards our head works 2 along the bench. It would be upstream from Star Road. 3 Q. Okay. Anywhere else that Settlers discharges 4 into a facility owned by Pioneer? 5 A. Not to my knowledge. 6 Q. Okay. You said there were other entities 7 besides Settlers. 8 What's the next one that comes to mind? 9 A. Nampa-Meridian. 10 Q. Okay. Where does Nampa-Meridian discharge? 11 A. Well, I don't know their boundaries in 12 relationship to our boundaries, but, you know, roughly 13 from Star Road downstream to roughly the City of Caldwell 14 boundaries. 15 Q. Okay. And is that the Phyllis Canal too? 16 A. That is the Phyllis Canal, yes. 17 Q. Okay. Any other irrigation districts that 18 discharge into Pioneer -- facilities that Pioneer claims 19 ownership in? 20 A. I believe Wilder Irrigation District. 21 Q. Okay. Where does Wilder Irrigation District 22 interface? 23 A. Roughly between the city of Nampa and the city 24 of Caldwell boundaries, and west of Caldwell. 25 Q. Okay. Anything else? Excuse me. Any other</p> <p style="text-align: right;">Page 281</p>	<p>1 discharge into Pioneer's facilities? 2 A. We've got some drain ditches, B Drain, Lowline 3 Canal. I believe your letter drains, your C Drain, 4 your -- the Dixie Drain, of course that's a Bureau of Rec 5 facility. 6 THE REPORTER: I'm sorry, a what? 7 THE WITNESS: That's a Bureau of Rec facility. 8 Right off the top of my head, that's -- 9 Q. (BY MR. STIDHAM) Okay. Where does the City of 10 Caldwell discharge into the B Drain? 11 A. Tenth and Ustick. 12 Q. Okay. Anywhere else? 13 A. Right off the top of my head, I don't know. 14 Q. Okay. What about the -- you'd identified the 15 Lowline Canal. 16 Where does the City of Caldwell discharge into 17 the Lowline Canal? 18 A. Well, the one that jumps out at me would be 19 Larch Street. 20 Q. Okay. You'd also identified the C Drain. 21 Where is it that you believe that City of Caldwell 22 discharges into the C Drain? 23 A. I believe off of Linden. 24 Q. Okay. Any other discharge points where you 25 believe the City of Caldwell discharges into Pioneer -- a</p> <p style="text-align: right;">Page 283</p>

12 (Pages 280 to 283)

1 facility that Pioneer claims ownership in?
 2 A. Another one would be at the A Drain.
 3 Q. Okay. Where at the A Drain?
 4 A. I believe at 20/26.
 5 Q. Okay. Any others?
 6 A. Nothing jumping out at me, no.
 7 Q. Okay. With regard to what you identified as
 8 the B Drain or the discharge point at the B Drain at
 9 Tenth and Ustick, why is it you contend the City of
 10 Caldwell discharges at that point?
 11 A. Just recently, I believe within the last two,
 12 three years, they have done a widening project on that
 13 intersection, which has installed a new corrugated metal
 14 pipe into the B Drain.
 15 Q. Okay. And do you have an understanding as to
 16 what that drains?
 17 A. To my knowledge, it's the runoff of Ustick and
 18 Tenth Avenue.
 19 Q. Do you know whether it drains any adjacent
 20 properties, any properties adjacent to the street?
 21 A. On that particular discharge pipe, not to my
 22 knowledge.
 23 Q. Okay. Have you done any analysis regarding
 24 that issue?
 25 A. Are you meaning an investigation as to whether

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1 or not that road runoff is going through that particular
 2 pipe?
 3 Q. No. I meant analysis as to whether any other
 4 entities that are discharging through that point other
 5 than the City of Caldwell.
 6 A. Other entities?
 7 Q. Other adjacent landowners.
 8 A. No. There is -- to my knowledge, there is no
 9 other landowners that are discharging through that
 10 particular pipe.
 11 Q. Okay. And did you go out there and take a
 12 look?
 13 A. Yeah. Yeah.
 14 Q. Or how did you come to that conclusion?
 15 A. Visual.
 16 Q. Okay. Who did you go out there with?
 17 A. Myself.
 18 Q. Anybody else?
 19 A. I believe Mark Zirschky is aware of it, and I
 20 believe my board members are also aware of it.
 21 Q. My question was, sir, did anybody else go out
 22 there and do the visual inspection with you?
 23 A. Visually inspecting the pipe?
 24 Q. I'd asked, "How did you come to that
 25 conclusion?"

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1 And I think you said you went out -- you said
 2 visual.
 3 I said, "Did you go out there with anybody?"
 4 And you said --
 5 A. During the construction?
 6 Q. No. At some point you reached the conclusion
 7 that only, as I take it, only the City of Caldwell is
 8 discharging at this point, correct?
 9 A. As I understand it, correct.
 10 Q. Okay. And as I understood it, you said you'd
 11 gone out and taken a look to come to this conclusion; is
 12 that correct?
 13 A. Correct.
 14 Q. My question is was there anybody with you when
 15 you went out and did this inspection?
 16 A. Mark Zirschky.
 17 Q. Anybody else?
 18 A. My board members.
 19 Q. When was this?
 20 A. It was a couple years ago. A year ago.
 21 Q. Who were the board members who were in
 22 attendance?
 23 A. Alan Newbill, Leland Ernest, and Rob
 24 Greenfield.
 25 Q. Okay. Do you know what time of year it is you

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1 went out there?
 2 A. Right off the top of my head, I can't remember.
 3 Q. Why did the group go out there?
 4 A. Because it was a new discharge pipe being
 5 installed into our system.
 6 Q. Okay. Do you know whether there had been a
 7 point of discharge in place there before what you're
 8 referring to as a new discharge pipe was put in place?
 9 A. Yes.
 10 Q. What was it?
 11 A. There was an existing ag return ditch that was
 12 on the west side of Tenth Avenue.
 13 Q. Okay. Why is it you refer to it as an ag
 14 return ditch?
 15 A. The adjacent property to that ditch is farm
 16 ground. That conveyed their wastewater, if you will,
 17 through this ditch into the B Drain.
 18 Q. And was the existing ditch, did that run
 19 alongside the road?
 20 A. To my knowledge, yes.
 21 Q. Okay. Right next to the road?
 22 A. To my knowledge, yes.
 23 Q. Okay. And about -- prior -- you know, prior to
 24 this new construction that you're referring to having
 25 occurred a couple years ago, this existing ditch, did

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<p>1 Q. And which proposal were you referring to when 2 you asked Mr. Zirschky this? 3 A. The one that's current. 4 Q. The as-built? 5 A. Uh-huh. 6 Q. And what's Mr. Zirschky's opinion? 7 A. I can't recall. 8 Q. Does the as-built condition work? 9 A. They had some issues. 10 Q. Okay. As we sit here today, does the as-built 11 condition work? 12 A. To my knowledge. 13 Q. Okay. Does the as-built condition create any 14 problems for Pioneer? 15 A. Could potentially. 16 Q. Okay. Has the as-built condition created any 17 problems for Pioneer today? 18 A. Other than that first year when we first brang 19 water in, the only problem that I've experienced is those 20 manholes that they put in the road started flooding when 21 we initially brang water in. 22 Q. And was that the first year? 23 A. That was the very first year we conveyed water 24 through it. 25 Q. Okay.</p> <p style="text-align: right;">Page 308</p>	<p>1 Q. Does the pipeline leak? 2 A. Not to my knowledge. 3 Q. I'm sorry, you were saying -- 4 A. Could potentially. 5 Q. Okay. Anything else that -- 6 A. Replacement of that pipe could potentially 7 create a problem for us. 8 Q. Okay. Anything else? 9 A. Nothing jumping out at me. 10 Q. If I understood your testimony, you consider 11 the discharge point into the B Drain to be part of the 12 construction, part of the Steelman well construction; is 13 that correct? 14 A. Correct. 15 Q. Okay. Was there any objection made at the -- 16 during the time of construction to the discharge point 17 being placed into the B Drain? 18 A. To my knowledge, we didn't have any knowledge 19 of that. 20 Q. Have you reviewed the proposed drawings to see 21 whether they indicated that there was a discharge point 22 into the B Drain? 23 A. I have not. 24 Q. Okay. Was there any discussion at or around -- 25 well, was there any discussion prior to construction with</p> <p style="text-align: right;">Page 310</p>
<p>1 A. Water was bubbling up from the middle of the 2 road, flooding out that intersection. And to my 3 knowledge, the City went out there and put a special lid, 4 if you will, on that manhole. To my knowledge, we 5 haven't had a leak there since. 6 Q. So as far as you know, the special -- what 7 you're referring to as the special lid solved the 8 problem? 9 A. To my knowledge. 10 Q. Okay. And any other issues that you can 11 identify that occurred as a result of the as-built 12 condition? 13 A. Other than the fact that the project involved 14 the -- the pipe going into the B Drain. 15 Q. Okay. Anything else? 16 A. Not to my knowledge. 17 Q. Okay. And I'd asked you whether you had -- I'd 18 asked you does the as-built condition create any problems 19 for Pioneer, and you said "could potentially." 20 What are you referring to as "could 21 potentially" in your response? 22 A. Well, if that manhole starts leaking again -- 23 Q. Okay. Anything else that you're referring to 24 when you say "could potentially"? 25 A. If the pipeline leaks.</p> <p style="text-align: right;">Page 309</p>	<p>1 the City of Caldwell during which the City of Caldwell 2 indicated there would be a discharge point placed into 3 the B Drain? 4 A. Not to my knowledge. 5 Q. Okay. Was there any discussion during 6 construction with the City of Caldwell where it was 7 communicated that a discharge point would be placed in 8 the B Drain? 9 A. No, not to my knowledge. 10 Q. Let's go back to the map if we could for a 11 second, Mr. Scott. And I'd asked you some questions 12 about facilities in which Pioneer claims ownership. 13 Let me ask you this: With regard to facilities 14 that Pioneer doesn't claim an ownership in, but which 15 Pioneer uses and maintains, so the Bureau facilities -- 16 okay? 17 A. Um-hmm. 18 Q. Okay. Could you identify for me first and 19 foremost the Bureau facilities that are used and 20 maintained by Pioneer? 21 A. You want me to identify all of them? 22 Q. Yeah. 23 A. Oh, boy. It would almost be easier for me to 24 identify the letter drains within our boundaries. Those 25 are the ones that are operated and maintained and owned,</p> <p style="text-align: right;">Page 311</p>

1 to my knowledge, by Pioneer.
 2 Q. Okay. So then it's your contention that all
 3 other drains are owned by the Bureau, they're just
 4 maintained and used by Pioneer; is that correct?
 5 A. Correct.
 6 Q. Okay. So what are you referring to as the
 7 letter drains again?
 8 A. We've got the A Drain, the B Drain, the C
 9 Drain, the D Drain, those facilities.
 10 Q. Okay. Is there an E drain?
 11 A. Yes, I believe so.
 12 Q. And is the E drain, does Pioneer claim
 13 ownership of the E drain?
 14 A. I believe so. I'm not too sure.
 15 Q. Does Pioneer claim ownership of the Noble
 16 Drain?
 17 A. No. That's a Bureau of Rec facility.
 18 Q. Okay. What about the Five Mile slough, does
 19 Pioneer claim ownership of that?
 20 A. Bureau of Rec.
 21 Q. Okay. The West End Drain, does Pioneer claim
 22 ownership of that?
 23 A. Bureau of Rec.
 24 Q. The Larchy Gulch, does Pioneer claim ownership
 25 of that?

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1 A. Bardsly Gulch?
 2 Q. Bardsly, excuse me.
 3 A. Yeah, that's Bureau of Rec.
 4 Q. Okay. Solomon Drain, is that Bureau of Rec?
 5 A. Bureau of Rec.
 6 Q. Wilson Drain, Bureau of Rec?
 7 A. Bureau of Rec.
 8 Q. Dixie Drain is Bureau of Rec, correct?
 9 A. Bureau of Rec.
 10 Q. Okay. And the 15 Mile Drain?
 11 A. Bureau of Rec.
 12 Q. And Mason Creek, is that owned by Pioneer?
 13 A. Bureau of Rec.
 14 Q. Okay. Are there any portions of Pioneer's
 15 canal delivery system that are owned by the Bureau of
 16 Rec?
 17 A. Shared.
 18 Q. Which are those?
 19 A. One, to my knowledge.
 20 Q. And which one is that?
 21 A. That would be the Lowline Notus Canal feeder.
 22 Q. Where is that located?
 23 A. Just north of Karcher Road, east of Lake,
 24 approximately a quarter mile east. And it's going to
 25 start right there north of Karcher Road. It's going to

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1 be on the west side of Wilson Creek, and it's going to be
 2 heading north all the way to Homedale Road.
 3 Q. Okay.
 4 A. Section 12.
 5 Q. Has the -- I'm jumping back to the Steelman
 6 well project.
 7 The discharge point that Pioneer contends was
 8 placed into the B Drain as part of the Steelman well
 9 project, has that caused any problems for you?
 10 A. Not to my knowledge.
 11 Q. Has Pioneer done any work to determine the
 12 capacity of Bureau-owned facilities?
 13 A. Not to my knowledge.
 14 Q. Okay. Now, with regard to the Bureau-owned
 15 facility, can you identify for me any irrigation
 16 districts that discharge into the Bureau-owned facilities
 17 that are maintained and used by Pioneer?
 18 A. Like I mentioned earlier, Nampa-Meridian, I
 19 believe, would dump into the Bureau of Rec facilities.
 20 Q. Which ones?
 21 A. I'm guessing, Five Mile, Ten Mile, Purdham
 22 Drain, Mason Creek.
 23 Q. Why is it that --
 24 A. Elijah.
 25 Q. Why is it that you're guessing? I mean, do you

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1 have a sense as a superintendent as to --
 2 A. I'm pretty sure. I'm pretty sure they're
 3 dumping into those facilities. I mean, water runs
 4 downhill. So all the ground upgradient is being
 5 irrigated. That's what's supplying the water into those
 6 drains.
 7 Q. And I apologize. I want to make sure I didn't
 8 interrupt you.
 9 You were identifying Bureau of Rec facilities
 10 that you understand Nampa-Meridian discharges into. You
 11 identified Five Mile, Ten Mile, Purdham, and Mason Creek.
 12 Anything else?
 13 A. Oh, yeah. Grimes Drain, Elijah Drain, Isaiah
 14 Drain, Wilson Slough, Upper Embankment, Bardsly. I think
 15 that's pretty much it. There might be a couple more.
 16 Q. Okay. So we talked about Nampa-Meridian. Any
 17 other irrigation districts that discharge into the
 18 Bureau-owned facilities that are operated and maintained
 19 by Pioneer?
 20 A. I believe Wilder would.
 21 Q. Which ones do you think Wilder would discharge
 22 into?
 23 A. Bardsly, Pipe Gulch. I'm guessing that they
 24 could potentially dump into the Shelp Drain. I'm having
 25 a hard time pinpointing where that starts at, though.

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20 (Pages 312 to 315)

<p>1 A. Township 4, 3 West.</p> <p>2 Q. And is there another entity upstream from</p> <p>3 Pioneer that uses that drain?</p> <p>4 A. I believe so.</p> <p>5 Q. And who is that?</p> <p>6 A. I believe it's Wilder.</p> <p>7 Q. Okay. All right. And just so we're clear,</p> <p>8 this blue line here on Exhibit 54, what does that</p> <p>9 indicate?</p> <p>10 A. That indicates the Phyllis Canal.</p> <p>11 Q. Okay. And is the Phyllis Canal, does that form</p> <p>12 one of the boundaries of Pioneer's district?</p> <p>13 A. Roughly.</p> <p>14 Q. Okay. But just roughly?</p> <p>15 A. Yeah. You can see these dark lines. North of</p> <p>16 those lines are in Pioneer boundaries so that the</p> <p>17 Phyllis, you can see that out of the boundaries right</p> <p>18 here.</p> <p>19 Q. Okay.</p> <p>20 A. It's out of the boundaries. This little corner</p> <p>21 goes inside of the boundaries, it goes back out of the</p> <p>22 boundaries, follows outside of the boundary just right on</p> <p>23 the edge. There is another little portion that comes</p> <p>24 inside the boundary, another little portion outside the</p> <p>25 boundary, right on the line --</p> <p style="text-align: right;">Page 328</p>	<p>1 Q. Okay.</p> <p>2 A. And if you notice our boundary line of the</p> <p>3 district is just inside that, so this Parker Gulch Drain</p> <p>4 does go outside the Pioneer boundaries and discharge into</p> <p>5 the West End Drain.</p> <p>6 Q. Okay. And which irrigation district is the</p> <p>7 West End Drain located within, if any?</p> <p>8 A. It is. I'm guessing it's Little Pioneer</p> <p>9 District. I'm not too sure, though.</p> <p>10 Q. Okay. So what's the next one that you've</p> <p>11 marked?</p> <p>12 A. The C Drain.</p> <p>13 Q. The C Drain. And that's -- Pioneer claims</p> <p>14 ownership of the C Drain, correct?</p> <p>15 A. Correct.</p> <p>16 Q. Okay. Does any entity discharge into the C</p> <p>17 Drain upstream from Pioneer?</p> <p>18 A. Not to my knowledge.</p> <p>19 Q. Okay. And where does the C Drain discharge</p> <p>20 into, if anywhere?</p> <p>21 A. It discharges into the West End Drain.</p> <p>22 Q. Okay. And it looks -- is the portion of the</p> <p>23 West End Drain that it discharges into located within</p> <p>24 Little Pioneer Irrigation District?</p> <p>25 A. It could be if that's the adjacent irrigation</p> <p style="text-align: right;">Page 330</p>
<p>1 Q. Okay. I can follow you, sir.</p> <p>2 A. It's going in and out of our whole entire</p> <p>3 boundary line all around here.</p> <p>4 Q. Okay. So is it fair to say that Phyllis kind</p> <p>5 of roughly goes in and out, and the boundary lines</p> <p>6 roughly track the Phyllis Canal?</p> <p>7 A. Correct.</p> <p>8 Q. Okay. Let's pick up where we've left off.</p> <p>9 What's the next drain you've marked in red?</p> <p>10 A. After Bardsly Gulch Drain, the next one would</p> <p>11 be Parker Gulch Drain.</p> <p>12 Q. Okay. Does any entity discharge into -- I'm</p> <p>13 sorry, how did you pronounce that again?</p> <p>14 A. Parker Gulch.</p> <p>15 Q. Does any entity discharge into Parker Gulch</p> <p>16 upstream from Pioneer?</p> <p>17 A. Not to my knowledge.</p> <p>18 Q. Okay. Does Parker Gulch discharge into any</p> <p>19 other entities -- excuse me, any other irrigation</p> <p>20 companies?</p> <p>21 MR. CAMPBELL: Objection; ambiguous.</p> <p>22 THE WITNESS: I believe so.</p> <p>23 Q. (BY MR. STIDHAM) Okay.</p> <p>24 A. Because it ultimately dumps into West End</p> <p>25 Drain. And that's this one that I identified in red.</p> <p style="text-align: right;">Page 329</p>	<p>1 district, yeah.</p> <p>2 Q. Okay. Is there any -- well, I'll take it back.</p> <p>3 I can see that there is. I'll ask that question again</p> <p>4 later.</p> <p>5 What's the next one that you've marked?</p> <p>6 A. Dixie Drain.</p> <p>7 Q. Okay. And have you marked the Dixie Drain on</p> <p>8 here?</p> <p>9 A. Yes.</p> <p>10 Q. Would you mind just putting that a little bit</p> <p>11 stronger in red again? Because it kind of overlaps with</p> <p>12 the orange.</p> <p>13 A. (Witness complies.)</p> <p>14 Good enough?</p> <p>15 Q. Yes. Thank you, Mr. Scott.</p> <p>16 So the Dixie Drain, are you aware of any</p> <p>17 irrigation district that discharges into the Dixie Drain</p> <p>18 upstream of Pioneer?</p> <p>19 A. Not to my knowledge.</p> <p>20 Q. Okay. And does -- where does the Dixie Drain</p> <p>21 end?</p> <p>22 A. West End Drain.</p> <p>23 Q. So the Dixie Drain discharges into the West</p> <p>24 End?</p> <p>25 A. I believe so, yes.</p> <p style="text-align: right;">Page 331</p>

<p>1 A. No other entity, to my knowledge, irrigates out 2 of the Street Drain. 3 Q. Okay. What's the next one that you've 4 identified? 5 A. Holcomb Drain. 6 Q. Holcomb? 7 A. Uh-huh. 8 Q. And Holcomb Drain, is that owned by Pioneer? 9 A. I don't believe so. 10 Q. Okay. What about the Street Drain, is that 11 owned by Pioneer? 12 A. I don't believe so. 13 Q. Okay. With regard to the Holcomb Drain, any 14 other entities that you're aware of that use the Holcomb 15 Drain downstream from Pioneer for the delivery of water 16 to customers? 17 A. Not to my knowledge. 18 Q. Okay. What's the next drain that you've 19 marked? 20 A. Corning Drain. 21 Q. And the Corning Drain, that's not used by 22 Pioneer to deliver water to customers, correct? 23 A. No, not to my knowledge. 24 Q. Any other entity that you're aware of 25 downstream from Pioneer that uses the Corning Drain to</p> <p style="text-align: right;">Page 324</p>	<p>1 Q. And is the E Drain owned by Pioneer? 2 A. Yes, I believe so. 3 Q. Okay. How is it that -- or I should say what 4 do you base your understanding -- on what do you base 5 your understanding that the E Drain is owned by Pioneer? 6 MR. CAMPBELL: Objection; calls for a legal 7 conclusion. 8 Go ahead and answer if you can. 9 THE WITNESS: To my knowledge, I've always been 10 under the impression that the letter drains, referring to 11 A Drain, B Drain, C Drain, D Drain, and E Drain are 12 Pioneer facilities. 13 Q. (BY MR. STIDHAM) And sir, what's the basis for 14 that? 15 A. That's what I've been told. 16 Q. Okay. When you came and joined Pioneer? 17 A. Yes. 18 Q. Who told you that, Mr. Freeman? 19 A. Yes. 20 Q. Okay. What's the next drain that you've 21 marked? 22 A. Where did we leave off, Shelp? 23 Q. E Drain. 24 A. E Drain. D Drain. 25 Q. Okay. And any entity that you're aware of</p> <p style="text-align: right;">Page 326</p>
<p>1 deliver water to customers? 2 A. Not to my knowledge. 3 Q. Okay. What's the next one? 4 A. Dickens Drain. 5 Q. Is the Dickens Drain used by Pioneer to deliver 6 water to customers? 7 A. Not to my knowledge. 8 Q. Any entity you're aware of downstream that uses 9 the Dickens Drain to deliver water to customers? 10 A. Not to my knowledge. 11 Q. What's the next drain that you've marked? 12 A. Shelp Drain. 13 Q. Shelp? 14 A. Shelp. 15 Q. Okay. And any entity that you're aware of 16 downstream from Pioneer that uses the Shelp Drain to 17 deliver water to customers? 18 A. Not to my knowledge. 19 Q. Okay. What's the next drain you've marked? 20 A. E Drain. 21 Q. E Drain? 22 A. Uh-huh. 23 Q. Okay. And the E Drain, is that used by any 24 entity downstream from Pioneer for the delivery of water? 25 A. Not to my knowledge.</p> <p style="text-align: right;">Page 325</p>	<p>1 downstream from the D Drain that uses it -- 2 A. Not to my knowledge. 3 Q. Okay. What's the -- well, let me ask you this 4 because maybe I can streamline this a little bit. 5 Are there any drains that you've marked in red 6 that -- for which you're aware of a downstream user that 7 uses the drain for delivery? 8 MR. CAMPBELL: Objection; ambiguous. 9 THE WITNESS: I believe the Dixie Drain does. 10 Q. (BY MR. STIDHAM) Okay. All right. So we'll 11 wait until we get to the Dixie Drain then and we'll ask 12 that question again and go into your understanding. 13 Okay? 14 A. (Witness nods head.) 15 Q. So let's get back. What's the next one after 16 the D Drain that you've identified? 17 A. Bardsly Gulch Drain. 18 Q. Okay. And where does that come into Pioneer's 19 system? 20 A. Where does it come into our system at? 21 Q. Yeah. 22 A. You mean where does it enter our boundaries? 23 Q. Yes. 24 A. Well, that would be in Section 33. 25 Q. Okay.</p> <p style="text-align: right;">Page 327</p>

<p>1 Q. (BY MR. STIDHAM) And I just want to know if 2 you have a recollection. I don't want to know what that 3 recollection is right now. 4 A. Vaguely. 5 Q. Okay. Can you tell me what that recollection 6 is? 7 MR. CAMPBELL: I'll instruct you not to answer to 8 the extent that it was communications while I was 9 present. 10 THE WITNESS: I can't answer that. 11 Q. (BY MR. STIDHAM) Okay. You can't answer 12 because Mr. Campbell -- 13 A. On -- yeah. 14 Q. Okay. Let's get on to Exhibit 59, if we could. 15 (Deposition Exhibit No. 59 was marked.) 16 Q. (BY MR. STIDHAM) First page of Exhibit 59 is 17 PID68706. 18 Do you see that? 19 A. Yes. 20 Q. And if you look at Exhibit 59, that's the board 21 minutes from February 7th, 2005; is that correct? 22 A. Correct. 23 Q. Okay. Take a look at the second page, which is 24 68707, about the middle of the page where it says, 25 "Tiling of the A-Drain."</p> <p style="text-align: right;">Page 408</p>	<p>1 Q. "Mr. Gregg and Mr. Caywood appeared before the 2 board to discuss the history of the drains." 3 Did I read that correctly? 4 A. Correct. 5 Q. Do you recall this meeting at all? 6 A. I do. 7 Q. Okay. What do you recall? 8 A. What I recall about this meeting is a portion 9 of the A Drain -- well, let me back up. 10 When I became superintendent, I was under the 11 impression that the drains within Pioneer boundaries are 12 Bureau of Rec facilities. The City of Caldwell had went 13 to the Bureau of Reclamation and gotten approval from the 14 Bureau of Reclamation to tile a portion of the A Drain. 15 And then later the developer in this case was requesting 16 to pipe this. 17 And so I'm under the impression that all drains 18 within Pioneer boundaries are the Bureau of Rec 19 facilities. So I sent them to the Bureau of Reclamation. 20 You've got to get their approval. It's their facility. 21 And in doing that, that's where Jerry Gregg and 22 John Caywood enlightened us that the A Drain is not a 23 Bureau of Rec facility. In fact, all lettered drains 24 within Pioneer's boundaries are not Bureau of Rec 25 facilities. They are actually owned and operated by</p> <p style="text-align: right;">Page 410</p>
<p>1 Do you see that paragraph where it says, 2 "Mr. Ben Weymouth representing the City of Caldwell, 3 Jamie Hoover representing Freehold Development, and 4 Mr. Scott Sherron and Mr. Laren Bailey with W & H Pacific 5 Engineers appeared before the board to request approval 6 to tile portions of the A-Drain to support future 7 commercial/industrial development." 8 Do you see that? 9 A. Um-hmm. 10 Q. And then a sentence or two in there it says, 11 "With input from superintendent Jeff Scott and his not 12 having any concerns regarding the proposed tiling, it was 13 the consent of the board to approve said requests." 14 Did I read that correctly? 15 A. Correct. 16 Q. Is that accurate in stating that you provided 17 input and did not have any concerns regarding the 18 proposed tile? 19 A. Correct. 20 Q. Take a look at the second page -- excuse me, 21 the next page, PID68708, top of the page, if you would. 22 And it states at the top of the page, "Jerold 23 Gregg and John Caywood, Bureau of Reclamation. 24 Do you see that? 25 A. Yes.</p> <p style="text-align: right;">Page 409</p>	<p>1 Pioneer. 2 So that changes the whole process in having to 3 relocate pipe, impact that easement or that facility 4 within that A Drain. If it's our facility, now you've 5 got to put it to our standards, get our engineer's 6 approval, get our agreements in place. And then it can 7 go forward. 8 Q. Okay. So if I understand it, prior to the 9 February 7th, 2005, meeting with Mr. Gregg and 10 Mr. Caywood, it was your understanding that none of the 11 drains within the City of Caldwell were owned by Pioneer? 12 A. Correct. 13 Q. Is it your understanding that the board 14 likewise understood prior to this meeting of February 15 7th, 2005, that all of the drains within Caldwell were 16 owned by the Bureau? 17 A. Correct. 18 MR. CAMPBELL: Objection. It misstates the 19 testimony of the witness. I think you misstated 20 Caldwell. It's Pioneer I think you were talking about. 21 Q. (BY MR. STIDHAM) I think we're all right. I'd 22 asked whether prior to this meeting the board likewise 23 understood that all of the drains within Caldwell were 24 owned by the Bureau; is that correct? 25 A. Correct.</p> <p style="text-align: right;">Page 411</p>

EXHIBIT D

<p>1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT 2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON 3 4 PIONEER IRRIGATION DISTRICT,) Case No. CV 08-556-C 5 Plaintiff,) VOLUME IV 6 vs.) Pages 393 - 589 7 CITY OF CALDWELL,) 8 Defendant.) 9 CITY OF CALDWELL,) 10 Counterclaimant,) 11 vs.) 12 PIONEER IRRIGATION DISTRICT,) 13 Counterdefendant.) 14 15 CONTINUED 30(b)(6) VIDEOTAPED DEPOSITION 16 OF MARK ZIRSCHKY 17 February 25th, 2009 18 Boise, Idaho 19 20 21 Pamela J. Leaton, CSR No. 200, RPR 22 23 24 25</p> <p style="text-align: right;">Page 393</p>	<p>1 A P P E A R A N C E S (Continued) 2 For the Defendant/ HAMILTON, MICHAELSON & HILTY, LLP 3 Counterclaimant: By: Mark Hilty, Esq. 4 1303 12th Avenue Road 5 Post Office Box 65 6 Nampa, Idaho 83653-0065 7 Telephone: (208) 467-4479 8 Facsimile: (208) 467-3058 9 mhilty@nampalaw.com 10 11 Also Present: John Glenn Hall, Videographer 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p style="text-align: right;">Page 395</p>
<p>1 CONTINUED 30(b)(6) VIDEOTAPED DEPOSITION 2 OF MARK ZIRSCHKY 3 4 BE IT REMEMBERED that the continued 30(b)(6) 5 videotaped deposition of MARK ZIRSCHKY was taken by the 6 Defendant/Counterclaimant at the law offices of Holland 7 & Hart, LLP, located at the U.S. Bank Plaza, 101 South 8 Capitol Boulevard, Suite 1400, Boise, Idaho, before 9 Associated Reporting, Inc., Pamela J. Leaton, a Court 10 Reporter and Notary Public in and for the County of Ada, 11 State of Idaho, on Wednesday, the 25th day of February, 12 2009, commencing at the hour of 9:00 a.m. in the 13 above-entitled matter. 14 APPEARANCES: 15 For the Plaintiff/ MOFFATT, THOMAS, BARRETT, ROCK 16 Counterdefendant: & FIELDS, CHARTERED 17 By: Tara L. Martens, Esq. 18 Scott L. Campbell, Esq. 19 U.S. Bank Building, 10th Floor 20 101 S. Capitol Boulevard 21 Post Office Box 829 22 Boise, Idaho 83701-0829 23 Telephone: (208) 845-2000 24 Facsimile: (208) 385-5384 25 tlm@moffatt.com slc@moffatt.com For the Defendant/ HOLLAND & HART LLP Counterclaimant: By: Erik F. Stidham, Esq. U.S. Bank Building, Suite 1400 101 S. Capitol Boulevard Post Office Box 2527 Boise, Idaho 83701-2527 Telephone: (208) 342-5000 Facsimile: (208) 343-8869</p> <p style="text-align: right;">Page 394</p>	<p>1 INDEX 2 EXAMINATION 3 4 MARK ZIRSCHKY PAGE 5 By: Mr. Stidham (Continued) 399 6 7 8 E X H I B I T S (Continued) 9 NO. 10 33. Amended Complaint for Declaratory and 427 11 Injunctive Relief (14 pages) 12 34. Interrogatory Response No. 26 with regard 483 13 to Survey No. A-15, with corresponding 14 survey, maps, and photos, COC079186 - 15 COC079188, COC079183, COC079189 - COC079190 16 (7 pages) 17 35. Interrogatory Response No. 26 with regard 497 18 to Survey No. A-17, with corresponding 19 survey, maps, and photos, COC079195 - 20 COC079196, COC079183, COC079197 - COC079199 21 (8 pages) 22 36. Interrogatory Response No. 26 with regard 507 23 to Survey No. B-1, with corresponding 24 survey, maps, and photos, COC079073 - 25 COC079075, COC079182, COC079081 - COC079084 (9 pages) 37. Interrogatory Response No. 26 with regard 523 to Survey No. 5-2 (2 pages) 38. Interrogatory Response No. 26 with regard 526 to Survey No. 5-10, with corresponding survey, maps, and photos, COC079214 - COC079215, COC079183, COC079216 - COC079217 (6 pages)</p> <p style="text-align: right;">Page 396</p>

<p>1 engineer -- strike that.</p> <p>2 You had identified Bruneau and 517. We</p> <p>3 talked about those; correct?</p> <p>4 A. Correct.</p> <p>5 Q. Okay. You also then identified the Five</p> <p>6 Mile Flume. Do you recall that?</p> <p>7 A. Correct.</p> <p>8 Q. Who was the engineer who was involved in the</p> <p>9 work related to the Five Mile Flume?</p> <p>10 A. I don't recall that information.</p> <p>11 Q. Was the engineer retained by Pioneer?</p> <p>12 A. My best recollection is there was bids on</p> <p>13 having the facility done, and I do not recall who the</p> <p>14 engineer was on the project.</p> <p>15 Q. Okay. When was the improvement related to</p> <p>16 the Five Mile Flume done? When was that work done?</p> <p>17 A. '92. Fall of '92.</p> <p>18 Q. Okay. Then you talked about various work</p> <p>19 that's been done on relocating laterals due to</p> <p>20 development.</p> <p>21 Have there been any engineers that Pioneer</p> <p>22 has gotten involved, other than Mr. Mason, on that type</p> <p>23 of work?</p> <p>24 MS. MARTENS: Object to the form. Lacks</p> <p>25 foundation.</p> <p style="text-align: right;">Page 425</p>	<p>1 banks or raise irrigation boxes. Piping some</p> <p>2 facilities, due to loss. Normal maintenance that occurs</p> <p>3 every year is done to aid in carrying capacity.</p> <p>4 I can't recall any other specifics.</p> <p>5 Q. (BY MR. STIDHAM) Does Pioneer own any</p> <p>6 property in fee simple?</p> <p>7 MS. MARTENS: Object to the form. Calls for legal</p> <p>8 analysis and conclusion. I believe it's been asked and</p> <p>9 answered as well.</p> <p>10 THE WITNESS: I believe so.</p> <p>11 Q. (BY MR. STIDHAM) Can you identify what that</p> <p>12 is?</p> <p>13 MS. MARTENS: Same objection.</p> <p>14 THE WITNESS: Not specifically, other than where</p> <p>15 our building is located.</p> <p>16 Q. (BY MR. STIDHAM) Okay. I'm going to hand</p> <p>17 you a document that we're going to mark as Exhibit 33,</p> <p>18 if we could.</p> <p>19 (Deposition Exhibit No. 33 was marked.)</p> <p>20 Q. (BY MR. STIDHAM) Can you tell me, have you</p> <p>21 seen Exhibit 33 before?</p> <p>22 A. I do believe I've seen this.</p> <p>23 Q. Okay. This is the Amended Complaint for</p> <p>24 Declaratory and Injunctive Relief filed by Pioneer; is</p> <p>25 that correct?</p> <p style="text-align: right;">Page 427</p>
<p>1 THE WITNESS: Pioneer uses another engineer, and I</p> <p>2 frequently forget his name. I don't recall.</p> <p>3 Q. (BY MR. STIDHAM) Okay. Can you -- going</p> <p>4 back to the Five Mile Flume, what was the scope of that</p> <p>5 project, the improvement?</p> <p>6 A. To replace an existing failing flume.</p> <p>7 Q. And you don't -- you don't know who the</p> <p>8 engineer who was involved in that project, correct, was?</p> <p>9 A. As far as the bids, I do not know.</p> <p>10 Q. Can Pioneer identify any modifications to --</p> <p>11 made to the carrying capacity of any of its canals since</p> <p>12 1990?</p> <p>13 Any modifications to the carrying capacity</p> <p>14 of any of its canals that have been made since 1990?</p> <p>15 MS. MARTENS: Object to the form.</p> <p>16 Answer if you understand.</p> <p>17 THE WITNESS: Yes, there have been.</p> <p>18 Q. (BY MR. STIDHAM) Okay. Can you identify</p> <p>19 what those are?</p> <p>20 MS. MARTENS: Same objection.</p> <p>21 THE WITNESS: What the improvements are?</p> <p>22 Q. (BY MR. STIDHAM) Yeah. The modification to</p> <p>23 the carrying capacity of the canal since 1990.</p> <p>24 MS. MARTENS: Same objection.</p> <p>25 THE WITNESS: Again, there's been efforts to raise</p> <p style="text-align: right;">Page 426</p>	<p>1 A. Can you repeat that?</p> <p>2 Q. Sure.</p> <p>3 Exhibit 33 is the Amended Complaint for</p> <p>4 Declaratory Injunctive Relief that was filed by Pioneer</p> <p>5 in this lawsuit; is that correct?</p> <p>6 A. Yes.</p> <p>7 Q. I'd like to direct your attention to the</p> <p>8 second page of the document, first paragraph, second</p> <p>9 sentence that begins "Pioneer provides."</p> <p>10 Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. The sentence reads, "Pioneer provides</p> <p>13 irrigation water and irrigation drainage functions to</p> <p>14 approximately 34,000 acres in Canyon County."</p> <p>15 Did I read that correctly?</p> <p>16 A. Yes.</p> <p>17 Q. Is that an accurate statement?</p> <p>18 A. Yeah.</p> <p>19 Q. Okay. Can Pioneer identify the 34,000 acres</p> <p>20 in Canyon County to which it provides irrigation</p> <p>21 drainage functions?</p> <p>22 A. Yeah, we have assessment records that would</p> <p>23 identify that.</p> <p>24 Q. And so is it fair to say every customer</p> <p>25 that's assessed by Pioneer is receiving irrigation</p> <p style="text-align: right;">Page 428</p>

<p>1 Q. Right.</p> <p>2 A. Yes, it is.</p> <p>3 Q. Okay. And the survey indicates that the</p> <p>4 discharge point is located in the A Drain; is that</p> <p>5 correct?</p> <p>6 A. Yes, it is.</p> <p>7 Q. Okay. Is the A Drain owned -- does Pioneer</p> <p>8 contend that it owns the A Drain?</p> <p>9 A. The A Drain is a Pioneer drain.</p> <p>10 Q. And when was this Discharge Point B, A-15</p> <p>11 identified?</p> <p>12 A. On the survey?</p> <p>13 Q. Uh-huh.</p> <p>14 A. The date says December 11th of 2008.</p> <p>15 Q. And now I'm just not limiting it to the</p> <p>16 survey, sir, but when did Pioneer first learn that</p> <p>17 Discharge Point B, Survey No. A-15 was installed or had</p> <p>18 been installed?</p> <p>19 A. I do believe the first time I was aware of</p> <p>20 it was at the time of the survey.</p> <p>21 Q. And I'm asking you as Pioneer's</p> <p>22 representative, so I'm a little bit -- going more</p> <p>23 broadly than just your knowledge.</p> <p>24 When is the first time that Pioneer became</p> <p>25 aware that Discharge Point B, Survey No. A-15 had been</p> <p style="text-align: right;">Page 489</p>	<p>1 the banks of the drain?</p> <p>2 A. Yes. Yes, you can.</p> <p>3 Q. Is it fair to say that -- well, which ride</p> <p>4 does this portion of the A Drain fall within?</p> <p>5 A. This is within Ride 6.</p> <p>6 Q. Okay. Is it fair to say that whoever was</p> <p>7 working Ride 6 during the course of maintenance, or some</p> <p>8 other activity, would have been able to identify that</p> <p>9 Discharge Point B, A-15 had been installed?</p> <p>10 MS. MARTENS: Object to the form. Calls for</p> <p>11 speculation.</p> <p>12 THE WITNESS: I guess if it was something they</p> <p>13 were used to seeing, and seeing something new, it might</p> <p>14 have registered in their mind. I can't speak for what</p> <p>15 they recall from one day to the next.</p> <p>16 Q. (BY MR. STIDHAM) Well, does Pioneer keep</p> <p>17 track or keep records of any kind regarding new</p> <p>18 discharge points that are installed into Pioneer's</p> <p>19 drains?</p> <p>20 A. Not prior to this survey.</p> <p>21 Q. Okay. Who is responsible for that ride at</p> <p>22 Pioneer?</p> <p>23 A. For Ride 6?</p> <p>24 Q. Yeah.</p> <p>25 A. Jeff Miller.</p> <p style="text-align: right;">Page 491</p>
<p>1 installed?</p> <p>2 A. I'm not aware that anybody else had any</p> <p>3 knowledge of it prior to the survey.</p> <p>4 Q. Is Discharge Point B, Survey No. A-15</p> <p>5 clearly visible?</p> <p>6 MS. MARTENS: Object to the form. Vague.</p> <p>7 THE WITNESS: I guess visible from where?</p> <p>8 Q. (BY MR. STIDHAM) Visible when you're</p> <p>9 walking alongside the canal -- or excuse me, the drain?</p> <p>10 MS. MARTENS: Same objection.</p> <p>11 THE WITNESS: I think depending on the time of</p> <p>12 year, sometimes it's under snow, sometimes it's hard to</p> <p>13 see.</p> <p>14 Q. (BY MR. STIDHAM) What about during</p> <p>15 non-irrigation season, is Discharge Point B, Survey A-15</p> <p>16 clearly visible?</p> <p>17 MS. MARTENS: Same objection.</p> <p>18 Q. (BY MR. STIDHAM) From the banks of the</p> <p>19 drain?</p> <p>20 A. During the non-irrigation season?</p> <p>21 Q. Yes.</p> <p>22 A. Again, given the time of the year and snow</p> <p>23 and other circumstances.</p> <p>24 Q. If there's no snow during the non-irrigation</p> <p>25 season, can one readily see Discharge Point B, A-15 from</p> <p style="text-align: right;">Page 490</p>	<p>1 Q. How long has Mr. Miller had that ride?</p> <p>2 A. Approximately six years.</p> <p>3 Q. Six years?</p> <p>4 A. Approximately.</p> <p>5 Q. Do you know whether Mr. Miller ever brought</p> <p>6 to the attention of anyone at Pioneer that at Discharge</p> <p>7 Point B, Survey No. A-15 had been installed?</p> <p>8 A. Not to my knowledge.</p> <p>9 Q. Did Pioneer object to the installation of</p> <p>10 Discharge Point B, Survey No. A-15?</p> <p>11 MS. MARTENS: Object to the form. Calls for a</p> <p>12 legal analysis and conclusion.</p> <p>13 THE WITNESS: To my knowledge, Pioneer was not</p> <p>14 aware at the time of the installation.</p> <p>15 Q. (BY MR. STIDHAM) Okay. Why do you say</p> <p>16 that? What facts do you base that statement upon?</p> <p>17 A. Again, my recollection as the first time</p> <p>18 being aware of this discharge point was at the time of</p> <p>19 the survey. I had no knowledge of it prior to that.</p> <p>20 Q. Okay. And you're talking about your</p> <p>21 personal knowledge; correct?</p> <p>22 A. Mine and Pioneer's, as far as I can recall.</p> <p>23 Q. Okay. Does Pioneer know whether or not</p> <p>24 Discharge Point B, Survey No. A-15 was installed more</p> <p>25 than five years ago?</p> <p style="text-align: right;">Page 492</p>

<p>1 Q. Yes.</p> <p>2 A. The B Drain.</p> <p>3 Q. Is the B Drain -- does Pioneer contend it</p> <p>4 owns the B Drain?</p> <p>5 A. Yes.</p> <p>6 MS. MARTENS: Object to the form. Calls for legal</p> <p>7 analysis and conclusion.</p> <p>8 MR. STIDHAM: Your answer, sir.</p> <p>9 THE WITNESS: Yes, my understanding.</p> <p>10 Q. (BY MR. STIDHAM) Take a look at the last</p> <p>11 three pages -- excuse me, last four pages of Exhibit 36.</p> <p>12 Do those pictures appear to relate to what we've been</p> <p>13 referring to as Discharge Point -- we're now referring</p> <p>14 to Discharge Point D, Survey No. B-1?</p> <p>15 A. There's a couple in there that I don't</p> <p>16 recognize, but the rest appear to.</p> <p>17 Q. Which are the ones that you don't recognize?</p> <p>18 A. COC079084.</p> <p>19 Q. Okay.</p> <p>20 A. And then on COC079083, lower left-hand</p> <p>21 corner of the page appears to be a different angle of</p> <p>22 the same picture.</p> <p>23 Q. Okay. Does Pioneer know whether or not</p> <p>24 Discharge Point D, Survey B-1 drains -- excuse me, is</p> <p>25 tied into drainage for the Church of Christ on 10th</p> <p style="text-align: right;">Page 521</p>	<p>1 through Discharge Point D?</p> <p>2 MS. MARTENS: Object to the form.</p> <p>3 THE WITNESS: Yes.</p> <p>4 Q. (BY MR. STIDHAM) Okay. And I guess my</p> <p>5 question is: So why has Pioneer not taken any steps to</p> <p>6 make a determination as to which property owners might</p> <p>7 be discharging stormwater through Discharge Point D,</p> <p>8 Survey B-1?</p> <p>9 MS. MARTENS: Same objection. I also think it</p> <p>10 misstates his earlier testimony.</p> <p>11 THE WITNESS: Yeah, I don't know. I don't have an</p> <p>12 answer.</p> <p>13 MR. STIDHAM: We've been going about an hour and</p> <p>14 ten. Do you want to take a break or go for a while</p> <p>15 longer?</p> <p>16 THE WITNESS: Sure.</p> <p>17 MR. STIDHAM: Which, sir?</p> <p>18 THE WITNESS: We can take a break.</p> <p>19 VIDEOGRAPHER: This is the end of Tape No. 2. Off</p> <p>20 the record.</p> <p>21 (Break taken from 2:25 p.m. to 2:34 p.m.)</p> <p>22 (Deposition Exhibit No. 37 was marked.)</p> <p>23 VIDEOGRAPHER: This is the beginning of Tape</p> <p>24 No. 3. On the record.</p> <p>25 Q. (BY MR. STIDHAM) Take a look at Exhibit No.</p> <p style="text-align: right;">Page 523</p>
<p>1 Avenue?</p> <p>2 A. I guess I don't -- I don't know where the</p> <p>3 Church of Christ is on 10th Avenue.</p> <p>4 Q. Well, does Pioneer know whether or not</p> <p>5 drainage from the Church of Christ ties into Discharge</p> <p>6 Point D, Survey No. B-1?</p> <p>7 A. I'm not sure.</p> <p>8 Q. Does Pioneer know whether or not the</p> <p>9 veterinarian on 10th Avenue also -- their facility also</p> <p>10 drains into Discharge Point D, Survey No. B-1?</p> <p>11 MS. MARTENS: Object to the form.</p> <p>12 THE WITNESS: Again, I don't know.</p> <p>13 Q. (BY MR. STIDHAM) Has Pioneer done any</p> <p>14 analysis regarding whether any property owners have</p> <p>15 stormwater from their property discharge through</p> <p>16 Discharge Point D, Survey B-1?</p> <p>17 MS. MARTENS: Object to the form. Overly vague --</p> <p>18 or overly broad and vague.</p> <p>19 THE WITNESS: No.</p> <p>20 Q. (BY MR. STIDHAM) Why not?</p> <p>21 MS. MARTENS: Object to the form. Calls for</p> <p>22 speculation.</p> <p>23 THE WITNESS: I do not know.</p> <p>24 Q. (BY MR. STIDHAM) Does Pioneer believe it's</p> <p>25 important to know who might be discharging stormwater</p> <p style="text-align: right;">Page 522</p>	<p>1 30, if you would.</p> <p>2 A. Excuse me?</p> <p>3 Q. Take a look at Exhibit No. 30, if you would</p> <p>4 for me.</p> <p>5 A. 30?</p> <p>6 Q. Should be in your notebook. I'll tell you,</p> <p>7 Mr. Zirschky, while you're consorting through there -- I</p> <p>8 think you might have gone too far.</p> <p>9 What I want you to reference is the exhibit</p> <p>10 for what we previously had identified as Discharge AA.</p> <p>11 MS. MARTENS: No, I think he's at 30.</p> <p>12 MR. STIDHAM: Okay. I'm sorry.</p> <p>13 MS. MARTENS: He's got 15 in his book, so it's</p> <p>14 bigger.</p> <p>15 MR. STIDHAM: Okay.</p> <p>16 Q. (BY MR. STIDHAM) Do you see that?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. And then I just handed you a document</p> <p>19 that I marked as Exhibit 37. Okay?</p> <p>20 A. Yep.</p> <p>21 Q. Okay. And we'd already gone through, in a</p> <p>22 previous deposition, and I had asked you questions about</p> <p>23 what previously was marked as AA and currently is E,</p> <p>24 survey No. 5-2.</p> <p>25 Do you remember that?</p> <p style="text-align: right;">Page 524</p>

<p>1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT 2 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON 3 4 PIONEER IRRIGATION DISTRICT,) Case No. CV 08-556-C 5) 6 Plaintiff,) VOLUME V 7 vs.) Pages 590 - 746 8) 9 CITY OF CALDWELL,) 10) 11 Defendant.) 12) 13 CITY OF CALDWELL,) 14) 15 Counterclaimant,) 16) 17 vs.) 18) 19 PIONEER IRRIGATION DISTRICT,) 20) 21 Counterdefendant.) 22) 23) 24) 25)</p> <p>CONTINUED 30(b)(6) VIDEOTAPED DEPOSITION OF MARK ZIRSCHKY</p> <p>March 3, 2009</p> <p>Boise, Idaho</p> <p>Pamela J. Leaton, CSR No. 200, RPR</p> <p>Page 590</p>	<p>1 A P P E A R A N C E S (Continued) 2 3 For the Defendant/ HAMILTON, MICHAELSON & HILTY, LLP 4 Counterclaimant: By: Mark Hilty, Esq. 5 1303 12th Avenue Road 6 Post Office Box 65 7 Nampa, Idaho 83653-0065 8 Telephone: (208) 467-4479 9 Facsimile: (208) 467-3058 10 mhilty@nampalaw.com 11 Also Present: Ron Garnys, Videographer 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>Page 592</p>
<p>1 CONTINUED 30(b)(6) VIDEOTAPED DEPOSITION 2 OF MARK ZIRSCHKY 3 4 BE IT REMEMBERED that the continued 30(b)(6) 5 videotaped deposition of MARK ZIRSCHKY was taken by the 6 Defendant/Counterclaimant at the law offices of Holland 7 & Hart, LLP, located at the U.S. Bank Plaza, 101 South 8 Capitol Boulevard, Suite 1400, Boise, Idaho, before 9 Associated Reporting, Inc., Pamela J. Leaton, a Court 10 Reporter and Notary Public in and for the County of Ada, 11 State of Idaho, on Tuesday, the 3rd day of March, 2009, 12 commencing at the hour of 9:13 a.m. in the 13 above-entitled matter. 14 APPEARANCES: 15 For the Plaintiff/ MOFFATT, THOMAS, BARRETT, ROCK 16 Counterdefendant: & FIELDS, CHARTERED 17 By: Tara L. Martens, Esq. 18 U.S. Bank Building, 10th Floor 19 101 S. Capitol Boulevard 20 Post Office Box 829 21 Boise, Idaho 83701-0829 22 Telephone: (208) 845-2000 23 Facsimile: (208) 385-5384 24 tlm@moffatt.com 25</p> <p>For the Defendant/ HOLLAND & HART LLP Counterclaimant: By: Erik F. Stidham, Esq. U.S. Bank Building, Suite 1400 101 S. Capitol Boulevard Post Office Box 2527 Boise, Idaho 83701-2527 Telephone: (208) 342-5000 Facsimile: (208) 343-8869 estidham@hollandhart.com</p> <p>Page 591</p>	<p>1 INDEX 2 EXAMINATION 3 4 MARK ZIRSCHKY PAGE 5 By: Mr. Stidham (Continued) 595 6 7 8 EXHIBITS 9 NO. 10 41. Photographs of Outfalls 5-2 and 5-10 594 11 and Caldwell City Map boundaries, 12 PID089137 - PID089153 (17 pages) 13 42. Pioneer Irrigation District "History 630 14 File," PID088788 - PID088883 (95 pages) 15 43. 5-6-2004 letter from Pioneer Irrigation 675 16 District to City of Caldwell Community 17 Development Department, COC003983 - 18 COC003985 (3 pages) 19 44. Map (1 page) 710 20 21 22 23 24 25</p> <p>Page 593</p>

<p>1 A. They most certainly could be. They're all 2 interlinked with each other. To a point, they could be. 3 Q. Okay. Could you -- and I've got a green 4 marker here. Could you identify, by tracing a green 5 highlighter, those facilities that are Bureau of 6 Reclamation facilities within the Caldwell area of 7 impact? 8 MS. MARTENS: Counsel, could we do that as a 9 homework assignment? 10 THE WITNESS: I'll be honest with you, without 11 seeing them labeled, it's going to be difficult. 12 MR. STIDHAM: Okay. 13 THE WITNESS: There's so many laterals and so many 14 drains close to one another, it's going to be difficult. 15 Q. (BY MR. STIDHAM) As you look at this map -- 16 let me ask you this way, because then maybe I can get a 17 better understanding. I'm trying to get an 18 understanding of what Pioneer's contention is. 19 When you look at the map of -- that's before 20 you, are 50 percent of the facilities that are set out 21 on that map Bureau of Reclamation facilities? 22 A. Again, without seeing them labeled, I don't 23 know -- I don't know which ones -- I don't know what 24 percentage there would be. 25 There could be bureau drains that are not</p> <p style="text-align: right;">Page 718</p>	<p>1 a Pioneer facility? 2 A. It is. 3 Q. Okay. And the A Drain -- 4 A. Well, I'm sorry, you were asking for 5 bureau's; right? 6 Q. Yeah. 7 A. I'm sorry. 8 Q. What I'm looking for, sir, is where a bureau 9 facility would enter into a Pioneer facility. 10 A. Would enter into. 11 Q. Yeah. Water from a bureau facility would 12 enter into a Pioneer facility. 13 And if you just put a little blue X using 14 that Sharpie I've given you where that occurs. 15 A. (Witness complied.) 16 Q. Okay. If you could just circle that a 17 little bit, so we could see it more readily. 18 A. (Witness complied.) 19 Q. Thanks. 20 Anywhere else that a bureau facility enters 21 into a Pioneer facility, water from a bureau facility? 22 MS. MARTENS: Counsel, is this an exhaustive 23 question, or are you just searching for examples? 24 MR. STIDHAM: Well, if he tells me he can't do it 25 exhaustively, that's fine. I'd like to see how much</p> <p style="text-align: right;">Page 720</p>
<p>1 listed. There could be district drains that are not 2 listed or district facilities that are not listed. 3 Q. Okay. Without reference to the map, do you 4 have any understanding as to whether, out of all the 5 facilities that Pioneer uses to deliver water, what 6 percentage of those facilities are owned by the Bureau 7 of Reclamation? 8 MS. MARTENS: Object to the form. Vague and 9 ambiguous. 10 THE WITNESS: There's -- there's a fair amount 11 overall linked, but I've never measured the lengths of 12 the drains. I don't know how they compare. 13 Q. (BY MR. STIDHAM) Okay. Are the Bureau of 14 Reclamation facilities within -- that Pioneer operates 15 or maintains, are those linked with Pioneer's own 16 facilities? 17 A. A lot of them are. Some of them are not. 18 Q. Okay. Can you identify on the map for me 19 where some of the Bureau of Reclamation facilities link 20 up or integrate with a Pioneer facility? 21 A. Again, it's going to be tough to do without 22 being labeled. 23 The 500 Lateral -- the 500 Lateral down here 24 toward Lincoln is going to spill into the A Drain. 25 Q. Okay. And, again, the 500 Lateral, is that</p> <p style="text-align: right;">Page 719</p>	<p>1 more progress he can make. 2 THE WITNESS: It's difficult where things aren't 3 labeled. 4 Q. (BY MR. STIDHAM) And I'll tell you -- I 5 don't know if this will help you or not, but my 6 understanding is that this map was made by taking an 7 overlay from one of the Pioneer -- or taking one of the 8 levels from Pioneer's maps and then overlaying city 9 boundaries on it. So I don't know if that helps you at 10 all. 11 A. Well, it's -- I'm just used to seeing them 12 labeled by name and don't necessarily know all of them 13 right out of my head here. 14 Q. Okay. Well, what are -- let me ask you this 15 way, sir: Can you identify some significant -- some 16 points where there is significant entrance of water from 17 a bureau facility into a Pioneer facility? 18 A. Just verbally? 19 Q. Yes. 20 A. Yes. 21 Q. Can you identify them for us? And maybe we 22 can go back to the map later. 23 A. The Five Mile Drain feeds the Highline. 24 Q. And Five Mile Drain is a bureau facility? 25 A. It is.</p> <p style="text-align: right;">Page 721</p>

EXHIBIT E

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Pioneer Irrigation District

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

PLAINTIFF PIONEER IRRIGATION
DISTRICT'S ANSWERS AND RESPONSES TO
CITY OF CALDWELL'S SECOND SET OF
DISCOVERY REQUESTS

INTERROGATORY NO. 32: Please identify the historical discharge rate of storm water discharge into Pioneer's irrigation and drainage facilities.

ANSWER TO INTERROGATORY NO. 32: Pioneer objects to this interrogatory because the term "historio discharge rate" is ambiguous and undefined. Each acre within Pioneer Irrigation District is allotted one miner's inch, or 0.02 cfs, of irrigation water, if water supplies are available each year. The portion of that irrigation water that is not used through biological demand/uptake, and that does not infiltrate into the ground, may return to Pioneer facilities through various discharge points. Any stormwater discharges to Pioneer facilities from undeveloped agricultural land have been limited to sheet flows originating on largely pervious land surfaces adjacent to Pioneer facilities. The rate of sheet flow discharge varies depending upon the intensity and duration of any particular storm event and upon the infiltration capacity of the adjacent lands. Pioneer has no measured flow data for predevelopment stormwater discharge to Pioneer facilities.

IV.
RESPONSES TO REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 11: Admit that Pioneer is not bringing any claim for violation of the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* in this lawsuit.

RESPONSE TO REQUEST FOR ADMISSION NO. 11: Admit.

REQUEST FOR ADMISSION NO. 12: Admit that Pioneer has not been cited for any violation of the federal Clean Water Act, 33 U.S.C. § 1251, *et seq.*

RESPONSE TO REQUEST FOR ADMISSION NO. 12: Admit.

REQUEST FOR ADMISSION NO. 13: Admit that the federal Environmental Protection Agency has not threatened Pioneer with enforcement of the Clean Water Act, 33

U.S.C. § 1251, *et seq.* for any increase in storm water discharge alleged to have been caused by the City of Caldwell.

RESPONSE TO REQUEST FOR ADMISSION NO. 13: Admit.

REQUEST FOR ADMISSION NO. 14: Admit that the federal Environmental Protection Agency has not initiated any proceedings against Pioneer.

RESPONSE TO REQUEST FOR ADMISSION NO. 14: Admit.

REQUEST FOR ADMISSION NO. 15: Admit that the Idaho Department of Environmental Quality has not initiated any proceedings against Pioneer.

RESPONSE TO REQUEST FOR ADMISSION NO. 15: Admit.

REQUEST FOR ADMISSION NO. 16: Admit that Pioneer has not been penalized for the alleged unauthorized point source municipal storm water discharges, as described in Paragraph 36 of Pioneer's Amended Complaint.

RESPONSE TO REQUEST FOR ADMISSION NO. 16: Pioneer objects to this Request on the grounds that it is vague and ambiguous in that the term "penalized" is undefined. Pioneer also objects to this Request to the extent that it calls for a legal conclusion to which no response is required. Subject to and without waiving said objections and to the extent this Request required a response, Pioneer denies the same. Pioneer further asserts that the City's unauthorized point source municipal stormwater discharges have "penalized" it in the form of the following examples, without limitation: (1) degradation of the quality of the water Pioneer's facilities convey, (2) by interfering with Pioneer's ability to conduct facility inspection and maintenance operations during the non-irrigation season, (3) increasing threats of flooding and facility surcharge, and (4) causing or contributing to the cause of flooding from Pioneer facilities.

EXHIBIT F

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 900
Seattle, Washington 98101

Permit for Storm Water Discharges from Small Municipal Separate Storm Sewer Systems

**Authorization to Discharge Under the
National Pollutant Discharge Elimination System**

In compliance with the provisions of the Clean Water Act, 33 U.S.C. §1251 *et seq.*, as amended by the Water Quality Act of 1987, P.L. 100-4, the "Act," the

**City of Caldwell
(hereinafter the "permittee")**

is authorized to discharge from all municipal separate storm sewer system (MS4) outfalls existing as of the effective date of this permit to waters of the United States which include the Boise River and other associated waters of the United States within the Nampa Urbanized Area, in accordance with the conditions and requirements set forth herein.

This permit shall become effective October 15, 2009.

This permit and the authorization to discharge shall expire at midnight, October 14, 2014.

The permittee must reapply for permit reissuance on or before April 18, 2014, 180 days before the expiration of this permit if the permittee intends to continue operations and discharges from the MS4 beyond the term of this permit.

Signed this 4th day of September 2009



Michael A. Bussell, Director
Office of Water and Watersheds

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I. Applicability

A. Permit Area. This permit covers all areas within the Nampa Urbanized Area served by the municipal separate storm sewer system (MS4) owned or operated by the City of Caldwell (permittee).

B. Discharges Authorized Under This Permit. During the effective dates of this permit, the permittee is authorized to discharge storm water to waters of the United States from all portions of the MS4 located within the Nampa Urbanized Area that are owned or operated by the permittee, subject to the conditions set forth herein. This permit also authorizes the discharge of flows categorized as allowable non-storm water discharges in Part I.C of this permit.

C. Limitations on Permit Coverage

1. **Non-Storm Water Discharges.** The permittee is not authorized to discharge non-storm water from the MS4, except where such discharges satisfy one of the following three conditions:
 - a) The non-storm water discharges are in compliance with a separate NPDES permit;
 - b) The non-storm water discharges result from a spill and:
 - (i) are the result of an unusual and severe weather event where reasonable and prudent measures have been taken to minimize the impact of such discharge; or
 - (ii) consist of emergency discharges required to prevent imminent threat to human health or severe property damage, provided that reasonable and prudent measures have been taken to minimize the impact of such discharges;
 - or
 - c) The non-storm water discharges satisfy each of the following two conditions:
 - (i) The discharges consist of uncontaminated water line flushing; potable water sources; landscape irrigation (provided all pesticides, herbicides and fertilizer have been applied in accordance with manufacturer's instructions); lawn watering; irrigation water; flows from riparian habitats and wetlands; diverted stream flows; springs; rising ground waters; uncontaminated ground water infiltration (as defined at 40 CFR § 35.2005(20)) to separate storm sewers; uncontaminated pumped ground water or spring water; foundation and footing drains (where flows are not contaminated with process materials such as solvents); uncontaminated air conditioning or compressor condensate; water from crawlspace pumps; individual residential car washing; dechlorinated swimming pool discharges; routine external building wash down which does not use detergents;

street and pavement wash waters, where no detergents are used and no spills or leaks of toxic or hazardous materials have occurred (unless all spilled material has been removed); fire hydrant flushing; or flows from emergency firefighting activities;

and

(ii) The discharges are not sources of pollution to waters of the United States. A discharge is considered a source of pollution to waters of the United States for the purposes of this permit if it:

- (a) Contains hazardous materials in concentrations found to be of public health significance or to impair beneficial uses in receiving waters. (Hazardous materials are those that are harmful to humans and animals from exposure, but not necessarily ingestion);
- (b) Contains toxic substances in concentrations that impair designated beneficial uses in receiving waters. (Toxic substances are those that can cause disease, malignancy, genetic mutation, death, or similar consequences);
- (c) Contains deleterious materials in concentrations that impair designated beneficial uses in receiving waters. (Deleterious materials are generally substances that taint edible species of fish, cause taste in drinking waters, or cause harm to fish or other aquatic life);
- (d) Contains radioactive materials or radioactivity at levels exceeding the values listed in 10 CFR Part 20 in receiving waters;
- (e) Contains floating, suspended, or submerged matter of any kind in concentrations causing nuisance or objectionable conditions or in concentrations that may impair designated beneficial uses in receiving waters;
- (f) Contains excessive nutrients that can cause visible slime growths or other nuisance aquatic growths that impair designated beneficial uses in receiving waters;
- (g) Contains oxygen-demanding materials in concentrations that would result in anaerobic water conditions in receiving waters; or
- (h) Contains sediment above quantities specified in IDAPA 58.01.02.250.02.e or in the absence of specific sediment criteria, above quantities that impair beneficial uses in receiving waters, or

- (i) Contains material in concentrations that exceed applicable natural background conditions in receiving waters (IDAPA 58.01.02.200. 09). Temperature levels may be increased above natural background conditions when allowed under IDAPA 58.01.02.401.
2. **Discharges Threatening Water Quality.** The permittee is not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to an excursion above the Idaho water quality standards.
3. **Discharge Compliance with Anti-Degradation Policy.** The permittee is not authorized to discharge storm water that does not comply with Idaho's anti-degradation policy for water quality standards. Idaho's anti-degradation policy, IDAPA 58.01.02.051, can be obtained from the Idaho Department of Environmental Quality (IDEQ) at the address listed in Part IV.D.
4. **Snow Disposal to Receiving Waters.** The permittee is not authorized to dispose of snow directly to waters of the United States or directly to the MS4(s). Discharges from permittee-owned snow disposal sites and discharges associated with the permittee's snow management practices are authorized under this permit when such sites/practices are operated using best management practices (BMPs) as required in Part II.B.6. Such BMPs must be designed to prevent pollutants in the runoff and prevent excursions above the Idaho water quality standards.
5. **Storm Water Discharges Associated with Industrial and Construction Activity.** The permittee is authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit

II. Storm Water Management Program (SWMP) Requirements

A. General Requirements

1. The permittee must develop, implement and enforce a Storm Water Management Program (SWMP) designed to reduce the discharge of pollutants from the MS4 to the maximum extent practicable, and to protect water quality in receiving waters. The SWMP actions and activities must include BMPs, system design, engineering methods, and other provisions appropriate to control discharges of pollutants from the MS4.
2. The SWMP actions and activities are outlined through the minimum control measures in Parts II.B and II.C, and the assessment/monitoring requirements described in Part IV. The permittee must implement a SWMP that provides:

- a) BMPs selected, implemented, maintained and updated to ensure that storm water discharges do not cause or contribute to an excursion above an applicable numeric or narrative Idaho water quality standard; and
 - b) Measurable goals, including interim milestones, for each BMP.
3. Modifications to the SWMP must be made in accordance with Part II.D of this permit.
4. Implementation of one or more of the minimum control measures may be shared with or delegated to another entity other than the permittee. The permittee may rely on another entity only if:
- a) The other entity, in fact, implements the control measure;
 - b) The control measure, or component of that measure, is at least as stringent as the corresponding permit requirement; and
 - c) The other entity agrees to implement the control measure on the permittee's behalf. A binding written acceptance of this obligation is required. The permittee must maintain this obligation as part of the SWMP. If the other entity agrees to report on the minimum control measure, the permittee must supply the other entity with the reporting requirements in Part IV.C of this permit. The permittee remains responsible for compliance with the permit obligations if the other entity fails to implement the control measure.

B. Minimum Control Measures. The following minimum control measures must be accomplished through this Storm Water Management Program:

1. Public Education and Outreach

- a) Within two years of the effective date of this permit, the permittee must develop and implement an ongoing public education program to educate the community about the impacts of storm water discharges on local water bodies and the steps that citizens and businesses can take to reduce pollutants in storm water runoff.
- b) Beginning two years from the effective date of this permit and at least twice per year thereafter, the permittee must distribute appropriate storm water educational materials to the target audiences.
- c) Beginning two years from the effective date of this permit and at least once per year thereafter, the permittee must update its stormwater information webpage with appropriate educational information.

2. Public Involvement/Participation

- a) The permittee must comply with applicable State and local public notice requirements when implementing a public involvement/participation program.

- b) The permittee must make all relevant SWMP documents and all Annual Reports required by this permit available to the public. Within three years of the effective date of this permit, all SWMP documentation and Annual Reports must be posted online through its regularly maintained website (or a website sponsored by the permittee).
- c) The permittee must involve interested stakeholders in the development of the City's construction site runoff control program. The meeting schedule must be made known to the public, EPA and IDEQ through direct mail, email notification, and/or other locally appropriate means.
- d) Beginning two years from the effective date of this permit and at least once per year thereafter, the permittee must host a public meeting regarding the SWMP and progress to date.
- e) At least once per year, the permittee shall organize, promote and participate in community Clean Up Day(s).
- f) Within two years of the effective date of this permit, the permittee must organize and conduct a storm drain stenciling program. Within four years of the effective date of this permit, at least 75% of storm drains throughout the permittee's jurisdiction must be stenciled.

3. Illicit Discharge Detection and Elimination

An illicit discharge is any discharge to an MS4 that is not composed entirely of storm water. Exceptions are described in Part I.C of this permit.

- a) Within three years from the effective date of this permit, the permittee must develop and implement a plan to detect and eliminate illicit discharges into their MS4, including roadways and associated drainage facilities, ditches, pipes, culverts, catch basins and retention ponds in the permit area. This plan must include written spill response procedures to ensure protection of the permittee's MS4. The plan must include written procedures for detection, identification of the source, and removal of non-storm water discharges from the MS4. This plan must address illegal dumping into the MS4, and include training for City staff on how to respond to reports of illicit discharges. The permittee must develop an information management database system to track the activities and actions of the program.
- b) Within three years from the effective date of this permit, the permittee must effectively prohibit non-storm water discharges into the MS4 through an ordinance or other regulatory mechanism to the extent allowable under State or local law. The permittee must implement appropriate enforcement procedures and actions, including a written policy of enforcement escalation procedures for recalcitrant or repeat offenders.

- c) Through the ordinance or other regulatory mechanism set forth in Part II.B.3.b, the permittee must prohibit any of the non-stormwater flows listed in Part I.C.1.c only if such flows are identified (by EPA or the permittee) as a source of pollutants to the MS4. The permittee must document to EPA in the Annual Report any existing local controls or conditions placed on the types of non-storm water discharges in Part I.C.1.c.
- d) Within three years from the effective date of this permit, the permittee must update and complete its comprehensive MS4 map. At a minimum, the map(s) must show jurisdictional boundaries; the location of all City-owned or operated storm sewers, culverts, ditches, and other conveyances; the location of all inlets and outfalls; points at which the permittee's MS4 is interconnected with other MS4s; names and locations of all waters that receive discharges from those outfalls; locations of all permittee-owned or operated facilities, including all maintenance/storage facilities, and permittee-owned or private snow disposal sites. Locations of all outfalls must also be provided in latitude and longitude, and the diameter of all outfalls must be provided with the map. The maps must be available in electronic or digital format as appropriate. A copy of the completed map(s), as both a report and as an electronic file via Arc GIS format, must be submitted to EPA and IDEQ as part of the corresponding Annual Report.
- e) Within three years from the effective date of this permit, the permittee must begin an ongoing education program to inform users of the MS4, especially public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste. This program must be conducted in concert with the public education requirements outlined in Part II.B.1.
- f) Within three years from the effective date of this permit, the permittee must begin dry weather field screening for non-storm water flows from all storm water outfalls. By the expiration date of the permit, at least 20% of the permittee's outfalls within the Nampa Urbanized Area must be screened for dry weather flows. The screening should include field tests of selected parameters as indicators of discharge sources. Screening level tests may utilize less expensive "field test kits" using test methods not approved by EPA under 40 CFR Part 136, provided the manufacturer's published detection ranges are adequate for the illicit discharge detection purposes. The permittee must investigate any illicit discharge within fifteen (15) days of its detection, and must take action to eliminate the source of the discharge within 45 days of its detection.
- g) Within three years from the effective date of this permit, the permittee must inventory all industrial facilities that discharge directly to the permittee's MS4 within the permit area and submit this inventory as part of the corresponding Annual Report. The types of industrial facilities that must be inventoried are set forth in 40 CFR § 122.26(b)(14)(i-ix).

This inventory must include the name and address of the facility, and the location of its outfall.

4. Construction Site Storm Water Runoff Control

- a) Within three years from the effective date of this permit, the permittee must implement and enforce a program to reduce pollutants in any storm water runoff to the MS4 from construction activities resulting in land disturbance of greater than or equal to one acre. This program must also include controls for pollutants in such storm water discharges from activity disturbing less than one acre, if that construction activity is part of a larger common plan of development or sale that disturbs one acre or more.
- b) The permittee must provide appropriate information to representatives of proposed new development and redevelopment construction projects concerning the NPDES General Permit for Storm Water Discharges for Construction Activity in Idaho, #IDR10-0000 (Construction General Permit).
- c) Within three years from the effective date of this permit, the permittee must adopt an ordinance or other regulatory mechanism to the extent allowable under state or local law that requires all construction site operators to practice appropriate erosion, sediment and waste control. This ordinance or regulatory mechanism must include sanctions to ensure compliance. The permittee may evaluate any existing procedures, policies, and authorities pertaining to construction activities occurring on public property that may be used to assist in the development of the required regulatory mechanism.
- d) Within three years from the effective date of this permit, the permittee must publish and distribute requirements for construction site operators to implement appropriate erosion and sediment control BMPs and to control waste (such as discarded building materials, concrete truck washout, chemicals, litter and sanitary waste at a construction site) that may cause adverse impacts to water quality.
- e) Within three years from the effective date of this permit, the permittee must develop procedures for reviewing all pre-construction site plans for potential water quality impacts, including erosion and sediment control, control of other wastes, and any other impacts according to the requirements of the law, ordinance, or other enforceable mechanism created to comply with Part II.B.4.c. These procedures must include provisions for receipt and consideration of information submitted by the public.
- f) Within three years from the effective date of this permit, the permittee must implement a program to receive, track, and review information

submitted by the public regarding construction site erosion and sediment control complaints.

- g) Within three years from the effective date of this permit, the permittee must develop and implement procedures for site inspection and enforcement of control measures established as required in Parts II.B.4.c and d, including a written policy of enforcement escalation procedures for recalcitrant or repeat offenders. Within three years from the effective date of this permit, the permittee must inspect all construction sites in the permit area disturbing five (5) acres or more for appropriate erosion/sediment/waste control practices at least once per construction season. Within three years from the permit effective date, the permittee must also develop a written policy identifying how construction sites disturbing less than 5 acres will be prioritized for inspection.
- h) The permittee must comply with the Construction General Permit and all relevant local requirements for erosion, sediment and onsite materials control on public construction projects. The permittee must ensure that all contractors working on behalf of the permittee are complying with the Construction General Permit and all relevant local requirements for erosion, sediment, and onsite materials control on construction projects. The permittee must incorporate specific language in all contracts ensuring appropriate storm water management on all public construction projects.

5. Post-Construction Storm Water Management in New Development and Redevelopment

- a) Within four years from the effective date of this permit, the permittee must implement and enforce a program to address post-construction storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre (including projects less than one acre that are part of a larger common plan of development or sale) and that result in discharge into the permittee's MS4 within the permit area. The program must ensure that controls are enacted that will prevent or minimize water quality impacts from newly developed or redeveloped areas.
- b) Within four years from the effective date of this permit, the permittee must adopt an ordinance or other regulatory mechanism to the extent allowable under State or local law to address post-construction runoff from new development and redevelopment projects. If such requirements do not currently exist, development and adoption of a ordinance is required. The permittee may evaluate existing procedures, policies, and authorities pertaining to activities occurring on public property that may be used to assist in the development of the required regulatory mechanism.
- c) No later than the expiration date of this permit, the permittee must ensure proper long term operation and maintenance of all permanent

storm water management controls for newly developed project areas greater than or equal to one acre discharging to its MS4 located within the permit area.

- d) No later than the expiration date of this permit, the permittee must develop and implement a process for pre-construction plan review and inspection of permanent storm water management controls to ensure proper installation and appropriate long-term operation and maintenance.
- e) Within four years from the effective date of this permit, and at least once per year thereafter, the permittee must educate the development community about appropriate design, operation and maintenance of stormwater retention facilities and vegetative practices to address post-construction storm water runoff from new development and redevelopment within the permittee's jurisdiction.

6. Pollution Prevention and Good Housekeeping for Municipal Operations

- a) Within four years from the effective date of this permit, the permittee must develop and implement an operation and maintenance program intended to prevent or reduce pollutant runoff from municipal operations. This program must address municipal activities occurring within the permit area with potential for negative storm water related water quality impacts, including: the use of sand and road deicers; fleet maintenance and vehicle washing operations; street cleaning and maintenance; grounds/park and open space maintenance operations; building maintenance; solid waste transfer activities; water treatment plant operations; storm sewer system maintenance; and snow disposal site operation and maintenance. Examples of other municipal activities which may also be evaluated as relevant to the jurisdiction include, but are not limited to: materials storage; hazardous materials storage; used oil recycling; spill control and prevention measures for municipal refueling facilities; municipal golf course maintenance; municipal new construction and land disturbances; and snow removal practices.
- b) Within four years from the effective date of this permit and once per year thereafter, the permittee must develop and conduct appropriate training for municipal employees related to best maintenance practices for protection of water quality. This training must be conducted at least once per year and address the activities specified in Part II.B.6.a.
- c) Within four years from the effective date of this permit, the permittee must prepare and implement storm water pollution prevention plans for the permittee's fleet maintenance/street department site and waste water treatment plant.

C. Discharges to Water Quality-Impaired Receiving Waters.

1. The permittee must conduct storm water discharge monitoring as required in Part IV.
2. The permittee must determine whether storm water discharges from any part of the MS4 contribute pollutants of concern, either directly or indirectly, to any Clean Water Act ("CWA" or "Act") Section 303(d) listed water bodies. For the purposes of this permit, the Section 303 (d) listed water bodies according to the IDEQ 2002 Integrated Report include, but are not limited to, the Boise River, and associated tributaries. "Pollutant(s) of concern" refer to the pollutant(s) identified as causing or contributing to the water quality impairment. Pollutants of concern for the purposes of this permit are total phosphorus, sediment, and *E. coli*.
3. The permittee's Annual Report must include a description of how the activities in each of the minimum control measures in Part II.B are targeted by the permittee to control the discharge of pollutants of concern, and ensure to the maximum extent practicable that the MS4 discharges will not cause or contribute to an excursion above the applicable Idaho water quality standards. This discussion must specifically identify how the permittee will evaluate and measure the effectiveness of the SWMP to control the discharge of the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the permittee must provide updates on progress to date. The permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the first Annual Report required in Part IV.C, and update it annually in subsequent Annual Reports.

D. Reviewing and Updating the SWMP

1. The permittee must annually review their SWMP actions and activities as part of the preparation of the Annual Report required in Part IV.C
2. The permittee may request changes to any SWMP action or activity specified in this permit in accordance with the following procedures:
 - a) Changes to delete or replace an action or activity specifically identified in this permit with an alternate action or activity may be requested at any time. Modification requests to EPA must include:
 - (i) An analysis of why the original actions or activity is ineffective, infeasible, or cost prohibitive;
 - (ii) Expectations on the effectiveness of the replacement action or activity; and

(iii) An analysis of why the replacement action or activity is expected to better achieve the permit requirements.

b) Change requests must be made in writing and signed by the permittee in accordance with Part VI.E.

3. Documentation of any of the actions or activities required by this permit must be submitted to EPA upon request:

a) EPA may review and subsequently notify the permittee that changes to the SWMP are necessary to:

(i) Address discharges from the MS4 that are causing or contributing to adverse water quality impacts;

(ii) Include more stringent requirements necessary to comply with new federal or state statutory or regulatory requirements; or

(iii) Include other conditions deemed necessary by EPA to comply with water quality standards, and/or other goals and requirements of the CWA.

b) If EPA notifies the permittee that changes are necessary pursuant to Part II.D.3.a, the notification will offer the permittee an opportunity to propose alternative program changes to meet the objectives of the requested modification. Following this opportunity, the permittee must implement any required changes according to the schedule set by EPA.

4. Any formal modifications to this permit will be accomplished according to Part VI.A of this permit.

E. Transfer of Ownership, Operational Authority, or Responsibility for SWMP Implementation. The permittee must implement the actions and activities of the SWMP in all new areas added or transferred to the permittee's MS4 (or for which a the permittee becomes responsible for implementation of storm water quality controls) as expeditiously as practicable, but not later than one year from the date upon which the new areas were added. Such additions and schedules for implementation must be documented in the next Annual Report following the transfer.

F. SWMP Resources. The permittee must provide adequate finances, staff, equipment and other support capabilities to implement the SWMP actions and activities outlined in this permit.

III. Schedule for Implementation and Compliance

Table III Storm Water Management Program - Schedule for Implementation and Compliance		
Part of Permit	Storm Water Management Program Component	Compliance Date
General Requirements		
Part II.C	Submit written description of how SWMP actions are targeted to control the discharge of pollutants of concern, and how permittee will evaluate the effectiveness of those actions	As part of the 1 st Annual Report, annually thereafter
Part II.D. and IV.C	Conduct an annual review of SWMP implementation and submit an Annual Report to EPA and IDEQ Include Storm Water Discharge Monitoring Report (SWDMR)	-January 15, 2011, annually thereafter reflecting the 12 month period ending Oct 15th of the previous year -Jan 15, 2012; annually thereafter
Part IV.A	Develop a Monitoring Plan & Quality Assurance Plan for storm water discharge monitoring, provide written notice to EPA and IDEQ Begin monitoring	Within one year of permit effective date Two years from permit effective date
Public Education and Outreach (40 CFR §122.34(b)(1))		
Part II.B.1	Implement an ongoing public education program to educate the community about the impacts of storm water discharges on local water bodies and the steps that citizens and businesses can take to reduce pollutants in storm water runoff. (II.B.1.a)	Two years from effective date of this permit
	Distribute storm water educational materials to target audiences (II.B.1.b)	Beginning two years from permit effective date, and at least twice per year thereafter
	Update information on the stormwater website (II.B.1.c)	Beginning two years from permit effective date, and at least once per year thereafter
Public Involvement and Participation (40 CFR §122.34(b)(2))		
Part II.B.2	Post all SWMP documentation and Annual Reports on the permittee's website (II.B.2.b)	Three years from permit effective date, ongoing thereafter
	Engage interested parties in the development of the construction site runoff control program (II.B.2.c)	Within two years of the permit effective date, ongoing thereafter
	Conduct public meeting regarding SWMP implementation (II.B.2.d)	Within two years of the permit effective date at least once per year thereafter
	Organize and promote Community Clean Up Day(s) (II.B.2.e)	At least once per year
	Organize and conduct a storm drain stenciling program. At least 75% of storm drains stenciled (II.B.2.f)	Within two years of the effective date of this permit Within four years of permit effective date

Table III, continued Storm Water Management Program - Schedule for Implementation and Compliance		
Part of Permit	Storm Water Management Program Component	Compliance Date
<i>Illicit Discharge Detection and Elimination (40 CFR §122.34(b)(3))</i>		
Part II.B.3	Develop, implement and enforce a program to detect and eliminate illicit discharges into the MS4 (II.B.3.a)	Three years from the permit effective date
	Adopt an ordinance or other control measure to prohibit illicit discharges to the MS4(s); prohibit any specific non-storm water discharge, if necessary (II.B.3.b & c)	Three years from the permit effective date
	Develop/update a comprehensive storm sewer system map (II.B.3.d)	Three years from the permit effective date
	Inform public employees, businesses, and the general public of hazards associated with illegal discharges and improper disposal of waste (II.B.3.e)	Three years from the permit effective date
	Begin dry weather screening of outfalls Screen 20% of outfalls for dry weather flows (II.B.3.f)	Three years from the permit effective date Not later than permit expiration date
	Inventory the industrial facilities discharging storm water to the MS4 (II.B.3.g)	Three years from the permit effective date
<i>Construction Site Storm Water Runoff (40 CFR §122.34(b)(4))</i>		
Part II.B.4	Implement and enforce a construction site runoff control program for sites disturbing one or more acres of land; review and update the program as necessary (II.B.4.a)	Three years from the permit effective date
	Provide adequate direction to project proponents regarding the EPA Construction General Permit (II.B.4.b)	Upon permit effective date
	Adopt an ordinance or other control measure to require construction site operators to practice erosion, sediment and waste control (II.B.4.c)	Three years from the permit effective date
	Publish and distribute written requirements for construction site best management practices (II.B.4.d)	Three years from the permit effective date
	Develop, or review/update as necessary, procedures for reviewing site plans & accepting public input (II.B.4.e & f)	Three years from the permit effective date
	Implement site inspection & enforcement procedures. Inspect all construction sites >5 acres at least once per construction season. Develop a written policy identifying how construction sites disturbing < 5 acres will be prioritized for inspection (II.B.4.g)	Three years from the permit effective date
	Ensure all permittee-owned construction projects comply with EPA's Construction General Permit (II.B.4.h)	Upon permit effective date

Table III.A, continued Storm Water Management Program - Schedule for Implementation and Compliance		
Part of Permit	Storm Water Management Program Component	Compliance Date
<i>Post-Construction Storm Water Management (40 CFR §122.34(b)(5))</i>		
Part II.B.5	Develop and implement a program to address post-construction storm water runoff from new development and redevelopment projects (II.B.5.a).	Four years from the permit effective date
	Adopt an ordinance to address post-construction runoff from new development and redevelopment projects (II.B.5.b)	Four years from the permit effective date
	Ensure proper long term operation and maintenance of all post construction storm water BMPs. (II.B.5.c)	No later than the permit expiration date
	Develop and implement a site plan review process and site inspection program to ensure proper installation and long-term operation and maintenance of post-construction storm water management controls (II.B.5.d)	No later than the permit expiration date
	Educate development community on appropriate design, operation and maintenance of stormwater facilities and vegetative practices (II.B.5.e)	Four years from the permit effective date
<i>Pollution Prevention/Good Housekeeping (40 CFR §122.34(b)(6))</i>		
Part II.B.6	Develop and implement an operation and maintenance program intended to prevent or reduce pollutant runoff from municipal operations (II.B.6.a)	Four years from the permit effective date
	Develop and conduct appropriate training for municipal personnel (II.B.6.b)	Four years from the permit effective date, once per year thereafter
	Prepare storm water pollution prevention plans for the fleet maintenance/street department site and the water treatment plant (II.B.6.c)	Four years from the permit effective date

IV. Monitoring, Recordkeeping, and Reporting Requirements

A. Monitoring

1. At least once per year, the permittee must evaluate its compliance with these permit conditions, the appropriateness of identified BMPs, and progress toward achieving the minimum control measures. This evaluation of program compliance must be documented in each Annual Report required as described in Part IV.C.
2. **Monitoring Objectives.** The permittee must monitor the quality of storm water discharges from the MS4, as described in Part IV.A.5. Not later than one year from the effective date of this permit, the permittee must develop a monitoring plan that includes the quality assurance requirements defined in Part IV.A.6. The permittee must develop and implement a monitoring program to:
 - a) Estimate the pollutant loading currently discharged from the MS4s;
 - b) Assess the effectiveness and adequacy of control measures implemented through this permit; and
 - c) Identify and prioritize those portions of the MS4 requiring additional controls.
3. **Representative Sampling.** Samples and measurements taken for the purpose of monitoring must be representative of the monitored activity.
4. **Monitoring Procedures.** Monitoring must be conducted according to test procedures approved under 40 CFR Part 136. Where an approved 40 CFR Part 136 method does not exist, and other test procedures have not been specified, any available method may be used after approval from EPA and IDEQ.
5. **Storm Water Discharge Monitoring.** The permittee must conduct a storm water discharge monitoring program which meets the following minimum requirements:
 - a) The permittee must sample at least one storm water outfall discharging to each of the following water bodies: Indian Creek, Mason Creek and the Boise River. The permittee may identify alternative location(s) in the monitoring plan and sample at such alternative locations if the minimum number of outfalls per water body are not available to the permittee. The permittee must sample discharges from a minimum of three outfalls.
 - b) Not later than two years from the effective date of this permit, the permittee must begin storm water discharge monitoring for pollutants identified in Table IV.A.

Table IV.A: Monitoring Requirements

Parameter	Monitoring requirements		
	Sample location ¹	Sample frequency ²	Sample type ³
Flow (cfs)	See below	4 times/yr	Grab
Total suspended solids (mg/L)	See below	4 times/yr	Grab
Total phosphorus (mg/L)	See below	4 times/yr	Grab
Total Nitrogen	See below	4 times/yr	Grab
E. Coli	See below	4 times/yr	Grab
Outfall location to be determined by the permittee.			
² A minimum of four (4) samples must be collected in a calendar year. Monitoring should occur within the following periods: March — April, May — June, July — August, September — October. If samples cannot be collected due to lack of rainfall in these periods, samples may be collected in other months as necessary to meet the minimum of four (4) samples. Sampling should occur within the first 120 minutes (2 hours) of a storm event.			
³ Grab samples may be taken manually or with an automatic water sampler.			

6. Quality Assurance Requirements. The permittee must develop a quality assurance plan (QAP) for all monitoring required in this Part. The QAP must be developed concurrent with the monitoring plan within one year of the effective date of this permit. Any existing QAPs may be modified for the requirements under this section. Upon completion of the QAP, the permittee must provide written notice to to EPA and IDEQ, as indicated in Part IV.D.

- a) The QAP must be designed to assist in planning for the collection and analysis of storm water discharge samples in support of the permit and in explaining data anomalies when they occur.
- b) Throughout all sample collection and analysis activities, the permittee must use the EPA-approved QA/QC and chain-of-custody procedures described in the following documents:
 - (i) *EPA Requirements for Quality Assurance Project Plans EPA-QA/R-5* (EPA/240/B-01/003, March 2001). A copy of this document can be found electronically at: <http://www.epa.gov/quality/qs-docs/r5-final.pdf>
 - (ii) *Guidance for Quality Assurance Project Plans EPA-QA/G-5*, (EPA/600/R-98/018, February, 1998). A copy of this document can be found electronically at: <http://www.epa.gov/r10earth/offices/oea/epaqag5.pdf>

The QAP must be prepared in the format specified in these documents.

- c) At a minimum, the QAP must include the following:

- (i) Details on the number of samples, type of sample containers, preservation of samples, holding times, analytical methods, analytical detection and quantitation limits for each target compound, type and number of quality assurance field samples, precision and accuracy requirements, sample preparation requirements, sample shipping methods, and laboratory data delivery requirements;
 - (ii) Map(s) indicating the location of each sampling point;
 - (iii) Qualification and training of personnel; and
 - (iv) Name(s), address(es) and telephone number(s) of the laboratories, used by or proposed to be used by the permittee.
- d) The permittee must amend the QAP whenever there is a modification in sample collection, sample analysis, or other procedure addressed by the QAP.
- e) Copies of the QAP must be maintained by the permittee and made available to EPA and/or IDEQ upon request.

B. Recordkeeping

1. **Retention of Records.** The permittee must retain records and copies of all information (including all monitoring, calibration and maintenance records and all original strip chart recordings for any continuous monitoring instrumentation, copies of all reports required by this permit, a copy of the NPDES permit, and records of all data used to complete the application for this permit) for a period of at least five years from the date of the sample, measurement, report or application, or for the term of this permit, whichever is longer. This period may be extended at the request of the EPA at any time. Records include all information used in the development of the SWMP, all monitoring data, copies of all reports, and all data used in the development of the permit application.
2. **Availability of Records.** The permittee must submit the records referred to in Part IV.B.1 to EPA and IDEQ only when such information is requested. The permittee must retain all records comprising the SWMP required by this permit (including a copy of the permit language and all Annual Reports) at a location accessible to the EPA. The permittee must make records, including the permit application and the SWMP, available to the public if requested to do so in writing. The public must be able to view the records during normal business hours. The permittee may charge the public a reasonable fee for copying requests.

C. Reporting Requirements

1. **Storm Water Discharge Monitoring Report.** Within three years from the effective date of this permit, and once per year thereafter, all available storm water discharge monitoring data must be submitted as part of the Annual

Report. At a minimum, this Storm Water Discharge Monitoring Report must include:

- a) Dates of sample collection and analyses;
- b) Results of analytical samples collected;
- c) Location of sample collection;
- d) For the months sampled, estimates of the wet weather monthly average pollutant loads for each pollutant of concern at each sample location; and
- e) An annual cumulative estimate of pollutant loading for each parameter at each sample location, and an overall estimate of the contribution of pollutants from all storm water emanating from the permittee's MS4.

2. **Annual Report.** No later than January 15 of each year beginning in year 2011, the permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the first Annual Report will be from the effective date of this permit through October 15, 2010. The reporting period for all subsequent annual reports will be the 12 month period ending October 15th of the previous calendar year. Copies of all Annual Reports must be made available to the public, at a minimum, through a permittee-maintained website. The following information must be contained in each Annual Report:

- a) The report must assess compliance with this permit and progress towards achieving the identified actions and activities for each minimum control measure in Parts II.B and II.C. Status of each program area must be addressed, even if activity has previously been completed or has not yet been implemented;
- b) Results of any information collected and analyzed during the previous 12 month period, including storm water discharge analytical results of samples collected, estimates of cumulative daily and monthly average pollutant loads for each pollutant at each sample location, water quality monitoring as noted in this part and any other information used to assess the success of the program at improving water quality to the maximum extent practicable;
- c) A summary of the number and nature of inspections, formal enforcement actions, and/or other similar activities performed by the permittee;
- d) A summary list of any water quality compliance-related enforcement actions received from regulatory agencies other than EPA. Such actions include, but are not limited to, formal warning letters, notices of violation, field citations, or similar actions. This summary should include dates, project synopsis, and actions taken to address the compliance issue(s);
- e) Copies of education materials, ordinances (or other regulatory mechanisms), inventories, guidance materials, or other products produced as a result of actions or activities required by this permit;

- f) A general summary of the activities the permittee plans to undertake during the next reporting cycle (including an implementation schedule) for each minimum control measure;
- g) A description and schedule for implementation of additional BMPs that may be necessary, based on monitoring results, to ensure compliance with applicable water quality standards;
- h) Notice if the permittee is relying on another entity to satisfy any of the permit obligations, if applicable; and
- i) A description of the location, size, receiving water, and drainage area of any new MS4 outfall(s) owned or operated by the permittee added to the system since the previous annual reporting period.

D. Addresses. Reports and other documents required by this permit must be signed in accordance with Part VI.E and submitted to each of the following addresses:

EPA: United States Environmental Protection Agency
Attention: Storm Water Program
NPDES Compliance Unit
1200 6th Avenue, Suite 900 (OCE-133)
Seattle, WA 98101

IDEQ: Idaho Department of Environmental Quality
Boise Regional Office
1445 North Orchard
Boise, ID 83720

V. Compliance Responsibilities

A. Duty to Comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application.

B. Penalties for Violations of Permit Conditions

1. **Civil and Administrative Penalties.** Pursuant to 40 CFR Part 19 and the Act, any person who violates Section 301, 302, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any such sections in a permit issued under section 402 of the Act, or any requirement imposed in a pretreatment program approved under sections 402(a)(3) or 402(b)(8) of the Act, is subject to a civil penalty not to exceed the maximum amounts authorized by Section 309(d) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt

Collection Improvement Act (31 U.S.C. § 3701) (currently \$37,500 per day for each violation).

2. **Administrative Penalties.** Any person may be assessed an administrative penalty by the Administrator for violating Section 301, 302, 306, 307, 308, 318 or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under Section 402 of this Act. Pursuant to 40 CFR Part 19 and the Act, administrative penalties for Class I violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(A) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$16,000 per violation, with the maximum amount of any Class I penalty assessed not to exceed \$37,500). Pursuant to 40 CFR Part 19 and the Act, penalties for Class II violations are not to exceed the maximum amounts authorized by Section 309(g)(2)(B) of the Act and the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461) as amended by the Debt Collection Improvement Act (31 U.S.C. § 3701) (currently \$16,000 per day for each day during which the violation continues, with the maximum amount of any Class II penalty not to exceed \$177,500).
3. **Criminal Penalties.**
 - a) **Negligent Violations.** The Act provides that any person who negligently violates Sections 301, 302, 306, 307, 308, 318, or 405 of the Act, or any condition or limitation implementing any of such sections in a permit issued under Section 402 of the Act, or any requirement imposed in a pretreatment program approved under Section 402(a)(3) or 402(b)(8) of the Act, is subject to criminal penalties of \$2,500 to \$25,000 per day of violation, or imprisonment of not more than one year, or both. In the case of a second or subsequent conviction for a negligent violation, a person shall be subject to criminal penalties of not more than \$50,000 per day of violation, or by imprisonment of not more than two years, or both.
 - b) **Knowing Violations.** Any person who knowingly violates such sections, or such conditions or limitations is subject to criminal penalties of \$5,000 to \$50,000 per day of violation, or imprisonment for not more than three years, or both. In the case of a second or subsequent conviction for a knowing violation, a person shall be subject to criminal penalties of not more than \$100,000 per day of violation, or imprisonment of not more than six years, or both.
 - c) **Knowing Endangerment.** Any person who knowingly violates Section 301, 302, 303, 306, 307, 308, 318 or 405 of the Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of the Act, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. In the case of a second or subsequent conviction for a knowing

endangerment violation, a person shall be subject to a fine of not more than \$500,000 or by imprisonment of not more than 30 years, or both. An organization, as defined in Section 309(c)(3)(B)(iii) of the Act, shall, upon conviction of violating the imminent danger provision, be subject to a fine of not more than \$1,000,000 and can be fined up to \$2,000,000 for second or subsequent convictions.

- d) **False Statements.** The Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than two years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four years, or both. The Act further provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or non-compliance shall, upon conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

C. Need to Halt or Reduce Activity not a Defense. It shall not be a defense for the permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with this permit.

D. Duty to Mitigate. The permittee must take all reasonable steps to minimize or prevent any discharge or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

E. Proper Operation and Maintenance. The permittee must at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

F. Toxic Pollutants. The permittee must comply with effluent standards or prohibitions established under Section 307(a) of the Act for toxic pollutants within the time provided in the regulations that establish those standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

G. Planned Changes. The permittee must give notice to the Director and IDEQ as soon as possible of any planned physical alterations or additions to the permitted facility whenever:

1. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source as determined in 40 CFR §122.29(b); or
2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the permit.

H. Anticipated Noncompliance. The permittee must give advance notice to the Director and IDEQ of any planned changes in the permitted facility or activity that may result in noncompliance with this permit.

VI. General Provisions

A. Permit Actions. This permit may be modified, revoked and reissued, or terminated for cause as specified in 40 CFR §§ 122.62, 122.64, or 124.5. The filing of a request by the permittee for a permit modification, revocation and reissuance, termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

B. Duty to Reapply. If the permittee intends to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for and obtain a new permit. In accordance with 40 CFR §122.21(d), and unless permission for the application to be submitted at a later date has been granted by the Director, the permittee must submit a new application at least 180 days before the expiration date of the permit, or in conjunction with the fourth Annual Report. The reapplication package must contain the information required by 40 CFR §122.21(f) which includes: name and mailing address(es) of the permittee(s) that operate the MS4(s), and names and titles of the primary administrative and technical contacts for the municipal permittee(s). In addition, the permittee must identify the identification number of the existing NPDES MS4 permit; any previously unidentified water bodies that receive discharges from the MS4; a summary of any known water quality impacts on the newly identified receiving waters; a description of any changes to the number of applicants; and any changes or modifications to the Storm Water Management Program. The re-application package may incorporate by reference the fourth Annual Report when the reapplication requirements have been addressed within that report.

C. Duty to Provide Information. The permittee must furnish to the Director and IDEQ, within the time specified in the request, any information that the Director or IDEQ may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee must also furnish to the Director or IDEQ, upon request, copies of records required to be kept by this permit.

D. Other Information. When the permittee becomes aware that it failed to submit any relevant facts in a permit application, or that it submitted incorrect information in a permit application or any report to the Director or IDEQ, the permittee must promptly submit the omitted facts or corrected information.

E. Signatory Requirements. All applications, reports or information submitted to the Director and IDEQ must be signed and certified as follows.

1. All permit applications must be signed as follows:
 - a) For a corporation: by a responsible corporate officer.
 - b) or a partnership or sole proprietorship: by a general partner or the proprietor, respectively.
 - c) For a municipality, state, federal, or other public agency: by either a principal executive officer or ranking elected official.
2. All reports required by the permit and other information requested by the Director or the IDEQ must be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
 - a) The authorization is made in writing by a person described above;
 - b) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the organization; and
 - c) The written authorization is submitted to the Director and IDEQ.
3. Changes to authorization. If an authorization under Part V.I.E.2 is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part V.I.E.2 must be submitted to the Director and IDEQ prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Certification. Any person signing a document under this Part must make the following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

F. Availability of Reports. In accordance with 40 CFR Part 2, information submitted to EPA pursuant to this permit may be claimed as confidential by the permittee. In accordance with the Act, permit applications, permits and effluent data are not considered confidential. Any confidentiality claim must be asserted at the time of submission by stamping the words "confidential business information" on each page containing such information. If no claim is made at the time of submission, EPA may make the information available to the public without further notice to the permittee. If a claim is asserted, the information will be treated in accordance with the procedures in 40 CFR Part 2, Subpart B (Public Information) and 41 Fed. Reg. 36902 through 36924 (September 1, 1976), as amended.

G. Inspection and Entry. The permittee must allow the Director, IDEQ, or an authorized representative (including an authorized contractor acting as a representative of the Director), upon the presentation of credentials and other documents as may be required by law, to:

1. Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
2. Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
3. Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
4. Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

H. Property Rights. The issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or

property or invasion of other private rights, nor any infringement of state or local laws or regulations.

I. Transfers. This permit is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Act. (See 40 CFR §122.61; in some cases, modification or revocation and reissuance is mandatory.)

J. State/Tribal Environmental Laws

1. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act.
2. No condition of this permit releases the permittee from any responsibility or requirements under other environmental statutes or regulations.

K. Oil and Hazardous Substance Liability. Nothing in this permit shall be constructed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the CWA or Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

L. Severability. The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to the circumstances, and the remainder of this permit shall not be affected thereby.

VII. Definitions and Acronyms

All definitions contained in Section 502 of the Act and 40 CFR Part 122 apply to this permit and are incorporated herein by reference. For convenience, simplified explanations of some regulatory/statutory definitions have been provided but, in the event of a conflict, the definition found in the statute or regulation takes precedence.

“Administrator” means the Administrator of the EPA, or an authorized representative.

“Best Management Practices (BMPs)” means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States. BMPs also include treatment requirements, operating procedures, and practices to control runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

“Construction General Permit or CGP” means the current version of the U.S. Environmental Protection Agency’s *NPDES General Permit for Storm Water Discharges from Construction*

Activities in Idaho, Permit No. IDR10-0000. The permit is posted on EPA's website at www.epa.gov/npdes/stormwater/cgp.

"Control Measure" as used in this permit, refers to any Best Management Practice or other method used to prevent or reduce the discharge of pollutants to waters of the United States.

"CWA" or "The Act" means the Clean Water Act (formerly referred to as the Federal Water Pollution Control Act or Federal Water Pollution Control Act Amendments of 1972) Pub.L. 92-500, as amended by Pub. L. 95-217, Pub. L. 95-576, Pub. L. 96-483 and Pub. L. 97-117, 33 U.S.C. 1251 et seq.

"Director" means the Environmental Protection Agency Regional Administrator, the Director of the Office of Water and Watersheds, or an authorized representative.

"Discharge" when used without a qualifier, refers to "discharge of a pollutant" as defined at 40 CFR §122.2.

"Discharge of Storm Water Associated with Construction Activity" as used in this permit, refers to a discharge of pollutants in storm water runoff from areas where soil disturbing activities (*e.g.*, clearing, grading, or excavation), construction materials or equipment storage or maintenance (*e.g.*, fill piles, borrow areas, concrete truck washout, fueling) or other industrial storm water directly related to the construction process are located. (See 40 CFR §122.26(b)(14)(x) and 40 CFR §122.26(b)(15) for the two regulatory definitions of storm water associated with construction sites.)

"Discharge of Storm Water Associated with Industrial Activity" is defined at 40 CFR §122.26(b)(14).

"Discharge-related Activities" include: activities which cause, contribute to, or result in storm water point source pollutant discharges and measures to control storm water discharges, including the siting, construction, and operation of best management practices to control, reduce or prevent storm water pollution.

"Discharge Monitoring Report or DMR" means the EPA uniform national form, including any subsequent additions, revisions or modification for the reporting of self monitoring results by permittees. See 40 CFR §122.2.

"EPA" means the Environmental Protection Agency Regional Administrator, the Director of the Office of Water and Watersheds, or an authorized representative.

"Facility or Activity" means any NPDES "point source" or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under the NPDES program.

"IDAPA" means Idaho Administrative Procedure Act.

"IDEQ" means the Idaho Department of Environmental Quality.

"Illicit Connection" means any man-made conveyance connecting an illicit discharge directly to a municipal separate storm sewer.

"Illicit Discharge" is defined at 40 CFR §122.26(b)(2) and means any discharge to a municipal separate storm sewer that is not entirely composed of storm water, except discharges authorized under an NPDES permit (other than the NPDES permit for discharges from the MS4) and discharges resulting from fire fighting activities.

"Industrial Activity" as used in this permit refers to the eleven categories of industrial activities included in the definition of discharges of storm water associated with industrial activity at 40 CFR §122.26(b)(14).

"Industrial Storm Water" as used in this permit refers to storm water runoff associated with the definition of discharges of storm water associated with industrial activity.

"MEP" or "maximum extent practicable," means the technology-based discharge standard for municipal separate storm sewer systems to reduce pollutants in storm water discharges that was established by CWA Section 402(p). A discussion of MEP as it applies to small MS4s is found at 40 CFR §122.34.

"Measurable Goal" means a quantitative measure of progress in implementing a component of a storm water management program.

"MS4" means "municipal separate storm sewer system" and is used to refer to a Large, Medium, or Small Municipal Separate Storm Sewer System. The term, as used within the context of this permit, refers to small MS4s (see definition below) and includes systems operated by a variety of public entities (e.g., military facilities, prisons, and systems operated by other levels of government).

"Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA.

"Municipal Separate Storm Sewer" is defined at 40 CFR 122.26(b)(8) and means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains): (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the United States; (ii) Designed or used for collecting or conveying storm water; (iii) Which is not a combined sewer; and (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR §122.2.

"Nampa Urbanized Area" means the greater Nampa, Idaho, area delineated by the Year 2000 Census by the U.S. Bureau of the Census according to the criteria defined by the Bureau on March 15, 2002 (67 FR 11663) namely, the area consisting of contiguous, densely settled census block groups and census blocks that meet minimum population density requirements, along with adjacent densely settled census blocks that together encompass a population of at least 50,000 people.

"National Pollutant Discharge Elimination System" or "NPDES" means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements, under Sections 307, 402, 318 and 405 of the CWA. The term includes an "approved program."

"Outfall" means a point source (defined below) at the point where a municipal separate storm sewer discharges to waters of the United States and does not include open conveyances connecting two municipal separate storm sewers or pipes, tunnels, or other conveyances which connect segments of the same stream or other waters of the United States and are used to convey waters of the United States.

"Owner or operator" means the owner or operator of any "facility or activity" subject to regulation under the NPDES program.

"Permitting Authority" means U.S. Environmental Protection Agency, or EPA.

"Point Source" means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff.

"Pollutant" is defined at 40 CFR §122.2. A partial listing from this definition includes: dredged spoil, solid waste, sewage, garbage, sewage sludge, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial or municipal waste.

"Pollutant(s) of concern" includes any pollutant identified as a cause of impairment of any water body that will receive a discharge from a MS4 authorized under this permit.

"Post- construction stormwater management controls" or "permanent stormwater management controls" means those controls designed to treat or control runoff on a permanent basis once construction is complete.

"QA/QC" means quality assurance/quality control.

"QAP" means Quality Assurance Plan, or Quality Assurance Project Plan.

"Regional Administrator" means the Regional Administrator of Region 10 of the EPA, or the authorized representative of the Regional Administrator.

"Significant contributors of pollutants" means any discharge that causes or could cause or contribute to an excursion above any Idaho water quality standard.

"Small Municipal Separate Storm Sewer System" is defined at 40 CFR §122.26(b)(16) and refers to all separate storm sewers that are owned or operated by the United States, a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under Section 208 of the CWA that discharges to waters of the United States, but is not defined as "large" or "medium" municipal separate storm sewer system. This term includes systems similar to separate storm sewer systems in municipalities such as systems at military bases, large hospital or prison complexes, and highways and other thoroughfares. The term does not include separate storm sewers in very discrete areas such as individual buildings.

"Storm event" for the purposes of this permit is defined as precipitation greater than 0.1 inch in magnitude which occurs at least 72 hours from the previously measurable (greater than 0.1 inch rainfall) event.

"Storm Water" is defined at 40 CFR §122.26(b)(13) and means storm water runoff, snow melt runoff, and surface runoff and drainage.

"Storm Water Management Program (SWMP)" refers to a comprehensive program to manage the quality of storm water discharged from the municipal separate storm sewer system.

"TMDL" means Total Maximum Daily Load, an analysis of pollutant loading to a body of water detailing the sum of the individual waste load allocations for point sources and load allocations for non-point sources and natural background. See 40 CFR §130.2.

"Waters of the United States" means:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
2. All interstate waters, including interstate "wetlands";
3. All other waters such as interstate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
 - a. Which are or could be used by interstate or foreign travelers for recreational or other purposes;

- b. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - c. Which are used or could be used for industrial purposes by industries in interstate commerce;
- 4. All impoundments of waters otherwise defined as waters of the United States under this definition;
 - 5. Tributaries of waters identified in paragraphs 1. through 4. of this definition;
 - 6. The territorial sea; and
 - 7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs 1. through 6. of this definition.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA (other than cooling ponds for steam electric generation stations per 40 CFR Part 423) which also meet the criteria of this definition are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

EXHIBIT G

National Pollutant Discharge Elimination System (NPDES) Permit for

**City of Caldwell
Municipal Separate Storm Sewer System (MS4)**

NPDES Permit No. IDS-028118

Response to Comments on Proposed Permit

**September 2009
U.S. Environmental Protection Agency, Region 10**

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I. Introduction

On July 11, 2008, the U.S. Environmental Protection Agency Region 10 (EPA) proposed a draft National Pollutant Discharge Elimination System (NPDES) permit for discharges from the municipal separate storm sewer system (MS4) owned or operated by the City of Caldwell (City). This NPDES permit, # IDS-028118, will be referred to in this document as the City Permit or Permit.

EPA published a public notice announcing the proposed Permit in the *Idaho Statesman* and the *Idaho Press Tribune* on July 11, 2008. EPA also concurrently proposed seven similar NPDES permits for the following entities within both the Nampa and Boise Urbanized Areas: Idaho Transportation Department District #3 (NPDES Permit #IDS-028177); Ada County Highway District (NPDES Permit #IDS-028185); Notus Parma Highway District #2 (NPDES Permit #IDS-028151); Nampa Highway District #1 (NPDES Permit #IDS-028142); Canyon Highway District #4 (NPDES Permit #IDS-028134); City of Middleton (NPDES Permit #IDS-028100); and City of Nampa (NPDES Permit #IDS-028126). EPA hosted two public hearings regarding the proposed permits, on August 13, 2008, at the Nampa Police Station conference room, and August 14, 2008, at the Boise Public Library. In response to requests from City of Caldwell and each of the other permittees, EPA announced a 60 day extension to the comment period on September 2, 2008; through publication in the *Idaho Statesman* and *Idaho Press Tribune*, the extended comment period ended on November 19, 2008.

This document provides a response to comments received on the proposed City Permit. In some cases, the exact phrasing of the comment is presented. In other cases,

substantive portions of the comment were excerpted or summarized. The Administrative Record contains complete copies of each comment letter.

Comments were received from the City as well as from parties listed below. Each comment is credited to its author using the abbreviations indicated:

- City of Middleton (M)
- City of Caldwell (C)
- City of Nampa (N)
- Ada County Highway District (ACHD)
- Canyon Highway District No. 4 (CHD)
- Nampa Highway District No. 1 (NHD)
- Notus-Parma Highway District (NPHD)
- Idaho Transportation Department District 3 (ITD3)
- Lower Boise Watershed Council (LBWC)
- Association of Idaho Cities (AIC)
- Matthew Johnson, White Peterson, representing City of Nampa (MJ)
- Scott Campbell, Moffat Thomas, representing Pioneer Irrigation District (Pioneer Irrigation District)

Comments which are relevant to each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas are included and are attributed to their author as indicated. In general, comments are organized in the order the topic or issue is found in the proposed City Permit. Comments which are unique to City of Caldwell are included at the end of Section III. Where indicated, EPA has made changes to the final Permit.

II. State Certification under Clean Water Act §401

On May 27, 2008, the Idaho Department of Environmental Quality (IDEQ) provided a draft Clean Water Act (CWA) §401 certification, which found that the proposed City of Caldwell Permit provides reasonable assurance that Idaho water quality standards will be met. IDEQ accepted public comment on the draft certification concurrently with the EPA comment period through November 19, 2008.

IDEQ issued a final CWA §401 certification on August 25 2009. A copy of IDEQ's final certification is included in Appendix A.

III. Response to Comments

General Comments

1. **General comment (LBWC, AIC, ACHD):** EPA's approach for issuing similar NPDES permits to establish consistent, area wide expectations for the management of municipal storm water is appreciated.

Response: Comment noted.

2. **Comment regarding comment period extension (MJ):** During the 8/13/2008 public hearing, the commenter noted that EPA encourages and expects the regulated MS4s within the Urbanized Areas to cooperate in the implementation of SWMPs; however, the Agency only provided 70 days during the initial public comment period. The commenter suggested that an extension of 240 days is reasonable, given the complexity of the situation in the Treasure Valley, as well as to provide the opportunity for each of the Phase II MS4 entities to properly coordinate with each other and report back to their respective governing boards.

Response: In response to these comment period extension requests, EPA extended the original comment period by 60 days, providing a 130-day public comment period through November 19, 2008. To further clarify issues of concern to permittees, EPA and IDEQ staff met separately with representatives of Nampa, Nampa Highway District, Canyon Highway District, Caldwell, and Ada County Highway District over September 17-19, 2008.

3. **Comment regarding changes to Permit text and compliance dates which may be relevant to all of the MS4 Permits. (M, C, N, AIC, LBWC):** To maintain consistency among each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas, the commenters suggest that EPA consider text corrections requested by one entity to be relevant to each of the other eight permits. In addition, commenters request that several compliance dates be revised to better organize resources, and to establish coherent and efficient storm water management approach among permittees. Where conflicting schedules are suggested, EPA should use the longer period requested in all final permits.

Response: Comment noted. EPA will indicate in the comment response those changes which are made to each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

4. **Comment regarding the Permit effective date (M, N, C, CHD, NHD, LBWC):** Commenters request that EPA use its discretion to specify a Permit effective date of October 1, 2009. Because the Permit compliance dates are determined based on the Permit effective date, EPA should establish a specific date which corresponds with the MS4 operators' fiscal year. This allows permittees to obtain the necessary budgets within their respective organizations. The Permits' issuance (i.e., signature) date should be four to six months prior to the effective date to facilitate such planning.

Response: Pursuant to 40 CFR 124.15, EPA has the discretion to specify an effective date at the time of permit issuance. EPA is specifying an effective date of October 15, 2009, for each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

5. **Comment regarding compliance dates and the unique characteristics of the**

Nampa & Boise Urbanized Areas (LBWC, N): The unique characteristics of this area complicate the management of urban storm water, and permittees will require additional time to initiate many of the permit requirements. Historically, these Urbanized Areas have been predominately agricultural with an extensive irrigation system. As the population grows, and the areas convert from agricultural to urban land use, the potential for agricultural return flow to discharge into the canals and receiving waters (which also receive discharge from the existing MS4s) creates a unique situation. In addition, the large number of canals, receiving waters, storm water outfalls, irrigation companies, and highway districts add to the complexity of the situation.

Response: EPA acknowledges the complexity of the situation within the Nampa and Boise Urbanized Areas. EPA has attempted to accommodate the implementation challenges faced by the Cities, Highway Districts, and ITD3, by providing additional time to implement the required storm water management program (SWMP).

6. **Comment regarding authorization for New Discharges (AIC):** The EPA Region 10 seeks to authorize Lower Boise Phase 2 MS4 entities "to discharge from all MS4 outfalls *existing as of the effective date*" of the permits, "in accordance with the conditions and requirements set forth" in the final MS4 permits (draft Phase 2 MS4 permits open for public comment, emphasis added).

AIC understands that the urbanized areas in the Lower Boise have a high rate of population growth. And that the associated drainage infrastructure will also experience growth during the five year permit period. Therefore, even though the permittees are expected to apply the "best available technology" (BAT) to the "maximum extent practicable" (MEP), the urban growth and additional annexations to corporate boundaries will result in new storm water sources, including a potential to increase the quantity of pollutants during storm events greater than the drainage structure's engineered design storms. In order to ensure adequate authorization for these new discharges, AIC suggests that EPA Region 10 and IDEQ pursue one of the following two options:

- a. Revise the final Phase 2 MS4 permits to authorize "all existing *and new* discharges" from the municipal separate storm sewer systems (MS4s). Note: This approach is consistent with the exiting 2004 City of Portland MS4 permit issued by the State of Oregon (Permit Number 101314); or
- b. That the NPDES requirements for planned changes, including new discharges (i.e., per Part V.G. of the draft Phase 2 MS4 permits), be added as an annual reporting element in the final permits.

Response: These Permits only authorize discharges from the existing MS4 and its associated outfalls located within the Urbanized Area. EPA recognizes that the permittee may find additional outfalls or may construct additional outfalls within

the Urbanized Area. As such, EPA is adding a requirement to the Annual Report that requires the permittee to report to EPA and IDEQ any additional outfalls not previously identified. At that point, EPA will determine whether these outfalls result in a permit modification. A new Part IV.C.2.i has been added to the final permit as follows:

"The following information must be contained in each Annual Report:....

i) A description of the location, size, receiving water, and drainage area associated with of any new MS4 outfall(s) owned or operated by the permittee which have been added to the system since the previous annual reporting period."

7. General comment regarding Middleton's size relative to other MS4 operators (M): With a population under 6,000, the City has limited resources and funding capacity compared to larger communities. The City asks EPA to recognize these limitations as it considers its response to the City's comments.

Response: Comment noted.

8. General comment (N, LBWC): The streets and highways of Nampa are considered to be a part of its MS4 system. The street system requires constant maintenance, repair, and construction, all of which will be conducted under the Stormwater Management Plan and associated BMP framework; therefore these activities will not be construed as an "illicit discharge" to the MS4 system.

Response: EPA clarifies that storm water discharges which are specifically regulated under the NPDES program at 40 CFR § 122.26 may be discharged to and from the permittee's MS4 system, only when they are authorized under an appropriate NPDES permit. In the example provided, storm water discharges associated with construction activities disturbing 1 or more acres must be permitted under the NPDES General Permit for Construction Activities, #IDR10-0000. Storm water discharges associated with routine maintenance of the street or highway system is not considered a type of regulated "stormwater associated with 'small' construction activities", and thus, do not require separate NPDES permit coverage. See 40 CFR § 122.26(b)(16). The Permit has been revised to clarify this issue by adding the text below as a new Part I. C.5; each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas have been revised accordingly:

"Storm Water Discharges Associated with Industrial and Construction Activity. Permittees are authorized to discharge storm water associated with industrial activity (as defined in 40 CFR 122.26(b)(14)), and storm water associated with construction activity (as defined in 40 CFR 122.26(b)(14)(x) and (b)(15)), from their MS4s, only when such discharges are otherwise authorized under an appropriate NPDES permit."

9. **Comment regarding corrections to Fact Sheet Language (N):** Certain comments on the Draft Permit reference sections in the Fact Sheet related to the Draft Permit conditions. In those circumstances, the commenter requests that the Fact Sheet language be revised in accordance with the requested changes to the Draft Permit.

Response: EPA does not revise the Fact Sheet text; instead, this Response to Comments document supplements the Fact Sheet supporting issuance of the final NPDES permit.

10. **Comments regarding the Fact Sheet text (M):** The City corrects the physical address of the City offices as 6 North Dewey Avenue.

Response: Comment noted.

Comments Related to Permit Part I -Applicability

11. **Comment regarding Part I.A & B – Permit Area and Discharges Authorized Under the Permit (C):** In the event that the Nampa Urbanized Area map lags behind annexations and growth within the City of Caldwell, the City recommends modifying the language to read: "the Nampa Urbanized Area or the existing Caldwell City limits."

Response: Municipal storm water discharges from MS4s located within Urbanized Areas defined by the U.S. Census are required to obtain NPDES permit coverage. In permits for MS4 discharges, EPA (as the NPDES permitting authority) is limited to authorizing discharges to waters of the U.S. within the Urbanized Area, unless the NPDES permitting authority designates additional areas served by a MS4 located outside the Urbanized Area. EPA has not specifically designated any additional areas outside of the Nampa Urbanized Area within the City of Caldwell. Therefore, to the extent the City's limits expand, and those areas are not within the Urbanized Area, such areas would not necessarily be considered part of the permit area addressed by this permit. Given this, EPA declines to revise the language to read "the Nampa Urbanized Area or the existing Caldwell City limits." However, EPA strongly encourages the City and other MS4 operators to implement the SWMP in all areas that are annexed, etc. within the permittee's jurisdiction. Because the Urbanized Area will likely expand based on the next Census, it will benefit the City to implement the SWMP throughout its entire jurisdiction. These areas will become part of the permit area in the next issuance of the Permit.

12. **Comment regarding Part I.C.1.b.i -Non stormwater discharges (C):** Commenter requests clarification to this section, as it appears to link non-stormwater discharges to severe weather events. For clarification, the commenter proposes the phrase "are the result of an unusual and severe weather event" be deleted.

Response: EPA declines to make the change requested. It is EPA's intent to conditionally allow discharges associated with an accidental spill that occurs as a result of severe weather events.

13. Comment regarding Part I.C.1.c (i) and (ii) – Limitations on Permit Coverage/non-stormwater discharges (M): These sections contain references to "uncontaminated" and "concentrations" for non-stormwater discharges with no actual way of quantifying the specific item. It is unclear how this is controlled for the referenced items. The commenter suggests that the wording be changed to reference items with "no known contaminants" or disallowing items with "known concentrations that may impair."

Response: EPA declines to revise the permit as requested. The language as proposed is consistent with federal regulations and Idaho water quality standards (see 40 CFR § 122.34(b)(3)(iii) and IDAPA 58.01.02.200). In general, as used in this Permit, the term, "uncontaminated" means "containing no pollutants," and the term "concentration" means "detectable amounts of a pollutant".

14. Comment Regarding Part I.C.1.c.i – Limitations on Permit Coverage/non-stormwater discharges (ITD3, ACHD, C, CHD, NHD, N, M, LBWC, AIC) – Commenters suggest that "irrigation water" be added to the list, as is currently allowed in the Phase I MS4 permit for Boise, and provided for within EPA's Phase II regulations. Commenters note that the list of non-storm water discharges proposed in this Part includes "landscape irrigation," which is not the same as "irrigation water."

In addition, several commenters suggest that non-profit car washing, flows from riparian habitats and wetlands, residential building wash waters without detergents, fire fighting system testing and blow down for fire sprinklers be added as "allowable non-storm water" discharges.

Response: Allowable non-storm water discharges are outlined by EPA regulations at 40 CFR 122.26(d)(2)(iv)(B)(1) and 122.34(b)(3)(iii). In addition, EPA proposed to include several types of allowable non-storm water discharges in the 2008 version of the NPDES Multi-Sector General Permit (MSGP).

- "Lawn watering" and "irrigation water" were inadvertently omitted by EPA from the proposed text in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas. EPA has therefore corrected the text in each permit to add "lawn watering," "landscape irrigation," and "irrigation water" as allowable non-storm water which can be discharged from the MS4, provided the discharges are not sources of pollution to waters of the U.S. as further defined in Part I.C.1.
- Non-profit car washing, is not included in the federal regulations nor other NPDES stormwater permits as "allowable non-storm water discharges." EPA declines to make this revision as requested because such flows generally

contain pollutants. EPA believes that through education and other preventative measures, communities can (and should) promote practical alternatives to the direct discharge of non-profit car wash water to the MS4.

- The term "flows from riparian habitats and wetlands" is included in this Part as proposed; therefore, since it was already included in the permit, it does not need to be added.
- "Residential building wash waters without detergents" is the same as the proposed Permit language which states "routine external building wash down."
- Fire fighting system testing and blow down for fire sprinklers are not included in the federal regulations nor other NPDES stormwater permits as "allowable non stormwater discharges." Such flows may contain pollutants and the permittees should encourage fire departments to capture and dispose of such flows in a manner that does not directly discharge to the MS4.

In sum, EPA has added "lawn watering" and "irrigation water" to Part I.C.1.c.i but declines to add other items suggested by the commenters.

15. **Comment regarding Part I.C.1.c.i (NHD):** Commenter suggests that this Part be modified to exempt flows resulting from emergency firefighting activities without the added conditions identified in section I.C.1.c. ii. Placing these conditions on emergency services personnel, especially firefighters, will ultimately result in increased response times which at some point will result in the loss of life(s) for which the EPA would be responsible.

Response: The text of 40 CFR §§ 122.26 and 122.34 says: "discharges or flows from fire fighting activities are excluded from the effective prohibition against non-stormwater discharges and need only be addressed where they are identified as a significant source of pollutants to waters of the U.S." EPA will exercise its discretion in the event that such a discharge occurs through the permittee's MS4, and declines at this time to revise the Permit text.

16. **Comment regarding Part I.C.2 (Discharges threatening water quality), II.C.3, (Discharges to water quality impaired receiving waters), V.G (Planned changes) and Part VII (definition of "significant contributor of pollutants) (C, N):** Commenters request that EPA change the language from "violation" to "exceedance." A permit violation is established by the permitting authority based on failure to comply with a permit condition (or applicable law) and is done by legal notice process. The intent is to not "cause or contribute to exceedances." Exceeding a water quality criterion may or may not be cause for a "violation" as some numeric criteria have a maximum exceedance frequency of once in 3 years (for acute criteria) therefore one exceedance in a permit term would not necessarily be an exceedance of the particular criterion nor a "violation". There are several occurrences of

inappropriate use of the term in this context. However, EPA correctly uses the term in Part II.A.2.a. All the other usage of "violation" is in permit/law context.

Response: EPA clarifies that these portions of the Permit implement the federal NPDES regulations at 40 CFR 122.44(d)(1), which states:

"...Each NPDES permit shall include...any requirements ...necessary to...achieve water quality standards established under section 303 of the CWA...[L]imitations must control all pollutants...which...are or may be discharges at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."

Rather than revise the text as recommended by the commenters, in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas EPA has deleted the terms "violation" and "exceedance" from the Permit. EPA has revised the text in Parts I.C.2, II.A.2.a., II.C.3, and the definition of "significant contributor of pollutants" within Part VII, in accordance with 40 CFR §122.44(d) to include the phrase "*an excursion above [the] Idaho water quality standard.*"

17. **Comment regarding Part I.C.2 – Discharges threatening water quality (ACHD):** Commenter requests clarification of this Part. This requirement is too restrictive and could be construed as an effluent limit for all outfalls. Further, this language is vague, overly-broad, and does not provide the permittee adequate notice of what discharges EPA may consider not covered or not in compliance with the permit. Commenter suggests the text be edited to state:

"The permittee is not authorized to discharge stormwater that will cause, ~~or have the reasonable potential to cause or contribute to~~, violations of water quality standards"

Response: See Response to Comment #16. EPA declines to revise the permit text as suggested by the commenter. 40 CFR § 122.44(d) requires EPA to include permit conditions that ensure that there will not be a potential for the storm water discharges to cause or contribute to an excursion above Idaho water quality standards.

40 CFR §122.34 further refines the NPDES storm water permit program's goal of compliance with applicable water quality standards for the MS4 discharger, in that a NPDES permit for municipal stormwater must outline a SWMP designed to reduce pollutants to the maximum extent practicable(MEP). As such, EPA has included Part I.C.2 in the each of the MS4 permits in Idaho, plus requirements for the actions and activities to target and prevent pollutants discharged to and from the MS4.

18. **Comment regarding Part I.C.3 – Discharge Compliance with Anti-Degradation Policy (ACHD):** This Part may be problematic given that the permittee likely has little or no control over the water quality of the relevant receiving water or the

quality/timing of other entities' discharges. This requirement may result in cost shifting from other dischargers to the permittee, as storm water from the permittee's MS4 may require additional treatment before entering particular receiving water. It may be difficult to determine in advance of a discharge whether such discharge may violate the anti-degradation policy. Commenter recommends revising the text to state:

"Permittee is only authorized to discharge stormwater that complies with the State of Idaho's anti-degradation policy for water quality standards (See IDAPA 58.01 .02.051)."

Response: EPA must issue a NPDES permit that ensures that state water quality standards are met. The Anti-Degradation Policy is a state water quality standard. As such EPA has included the Permit text as proposed which has been previously suggested by IDEQ in other MS4 permits issued by EPA in the State of Idaho. EPA declines to revise the Permit text as suggested by the commenter.

19. Comment regarding Part I.C.4 – Snow Disposal to Receiving Waters (M, LBWC, N, C, NIID, CHD): EPA has provided insufficient rationale for including the permit condition related to snow dumping/disposal. Commenters request clarification of this Part pertaining to several topics:

- 1) EPA should clarify that snow cannot be disposed directly to waters of the United States or directly to the MS4s, except where/when needed to serve public property/safety in extreme conditions.
- 2) Commenters suggest that the phrase "snow management practices" be defined so that the typical practice of snow plowing with the snow removed from the roadway surface and directly deposited along the roadway is not included, and is allowed as a storm water discharge, as well as to specifically authorize the discharges due to snow removal from the traveled way to the adjacent curb/gutter and borrow ditches within the rights of way as required for public safety.
- 3) EPA should clarify that this Part specifically pertains to disposal sites that are owned and operated by the permittee.
- 4) Commenters also suggest various revisions to Part I.C.4, in order to specify that discharges from permittee-owned snow disposal sites and permittee's snow management practices be authorized under these permits when such sites are operated using best management practices (BMPs) designed to prevent or treat pollutants to the Maximum Extent Practicable

Response: EPA agrees to include the phrase "owned and operated by the permittee," in Part I.C.4 of the permit, but otherwise declines to revise the text as requested by the commenters.

The definition of "storm water" found at 40 CFR § 122.26(b)(13) means "stormwater runoff, snow melt runoff and surface runoff and drainage." This permit authorizes the discharge of storm water, including snow melt, from each of the eight Phase II MS4 operators within the Nampa and Boise Urbanized Areas to waters of the United States. Similar language to that found in Part I.C.4 of the Permits is contained in all MS4 permits issued by EPA Region 10. The purpose of this provision is to explicitly prohibit the practice of dumping excess snow collected from urban areas directly to waters of the United States. In addition, this Part also seeks to limit the discharge of pollutants in snow melt water from permittee-owned snow disposal sites and snow management practices through the implementation of BMPs.

Snow plowed from urban streets and parking lots can contain a variety of materials which accumulate on the snow pack and other cleared surfaces. Studies of urban snow disposal sites in northern climates demonstrate that snow melt water from such sites can be a source of significant pollutant loadings to surface water, and commonly contains pollutants such as debris, sediment, chlorides, and oil/grease. (See Appendix B of this document for references contained in the permit's Administrative Record).

In the preamble to the Phase II stormwater regulations, EPA discusses that it is appropriate for MS4 operators to consider controls for reducing or eliminating the discharge of pollutants from various municipal operations, including snow disposal areas operated by the municipality. (64 FR 68761-68762, December 8, 1999). EPA exercises its discretion to include this requirement in these MS4 permits and uses its enforcement discretion on a case-by-case basis when evaluating MS4 permit compliance with regard to snow disposal and management activities conducted by permittees.

EPA clarifies that the permittee's existing snow management activities to provide necessary public safety do not conflict with the requirements of this Permit, provided that the permittee employs all reasonable practices to minimize the accumulation of grit, litter, and other pollutants in snow plowed from the permittee's roadway. MS4 operators must define appropriate BMPs to control pollutants from municipal operations as required in Part II.B.6 -snow management throughout the permit area is one of several municipal activities that the permittee must assess in order to confirm that reasonable BMPs are being used by the permittee to protect water quality.

As described in the references listed in the Administrative Record, appropriate practices which the permittee should consider and utilize include: using upland areas for the storage and disposal of accumulated snow, preferably in flat areas at least 100 feet from adjacent water bodies, wetlands, and areas near public or private drinking water wells; dumping snow exclusively in pervious areas where it can infiltrate; conducting regular street sweeping once snow has melted to collect accumulated traction material; and/or removing sediment and debris from dump areas each spring.

20. **Adding Part I.C.5:** By adding this new Part, EPA clarifies that other types of regulated storm water (i.e., construction and industrial storm water) are authorized to

be discharged from the City's MS4, provided the regulated industrial or construction storm water is separately permitted under the appropriate NPDES permit.

Comments Related to City Permit Part II – SWMP Requirements

21. **Comment regarding Part II.B.1.a, b & c (Public Education) (M, N, C):** The compliance dates in this Part should be extended to allow at least 18 months from the permit effective date; one commenter suggests 2 years. Further, one commenter requests clarification that public education activities begin after the initial 2 year period. Each commenter states that additional time is necessary to manage the tasks and to allow for coordination with other MS4s in the Nampa Urbanized Area.

Response: EPA agrees to extend the compliance dates in Parts II.B.1.a, b & c to 2 years from the permit effective date. EPA has changed the text accordingly in the City of Middleton, City of Nampa and City of Caldwell permits. In addition, EPA has revised the relevant dates of Parts II.B.1.a & b in the ACHD, CHD, NHD, and NPHD permits. In the ITD3 permit, only the date of Part II.B.1.a has been revised. EPA clarifies that the tasks of II.B.1 b (and c, as reflected in the Cities' permits) are to begin after the initial two year period. Table III in each permit has also been updated to reflect these changes.

22. **Comment regarding Part II.B.1.b & c (C):** The City assumes it will have the discretion to determine what educational materials are appropriate and what individuals, groups/entities are considered to be "target audiences." If not, please clarify these phrases.

Response: Yes, the permittee has the discretion to identify target audiences and to determine appropriate outreach materials for those audiences.

23. **Comment regarding Part II.B.2.b, d, & f (Public Involvement) (C):** City of Caldwell requests three changes to this Part:

- 1) a compliance date three years from the permit effective date be for Part II.B.2.b (posting SWMP information on a website);
- 2) clarification that the requirement of Part II.B.2.d (public meetings regarding SWMP implementation) begins after that initial three year period; and
- 3) a compliance date of two years from permit effective date for initiating the storm drain stenciling program in Part II.B.2.f

Response: EPA agrees to extend the compliance date as requested for Part II.B.2.b for the Caldwell permit. For consistency, EPA has also revised this Part and Table III in the Middleton Permit and each of the other Phase II MS4 permits in the Boise/Nampa Urbanized Areas.

EPA declines to make the change requested for Part II.B.2.d of the Caldwell permit,

and clarifies that the requirement to host at least one public meeting regarding the SWMP per year begins within one year from the permit effective date.

EPA agrees to revise the date by which Caldwell begins its storm drain stenciling program to two years from the permit effective date, and revises the comparable requirement of Part II.B.2.c in the Middleton Permit.

24. **Comment regarding Part II.B.2.a (NHD, CHD):** Commenters request that the compliance date be revised to two years from permit effective date.

Response: Part II.B.2.a is the basic acknowledgement that permittees must comply with existing State/local public notice requirements. There is no compliance date associated with this requirement.

25. **Comment regarding Part II.B.2 (NHD):** Commenter requests clarification that other appropriate means (i.e. website, email, etc.) may be used to receive information from the public rather than the specified "citizens hotline telephone." There are more effective methods to obtain public information.

Response: EPA agrees. The NHD, NPHD, and CHD permit applications stated that telephone hotlines would be used to implement this minimum control measure, however given available technologies, EPA has revised the text of the NHD, NPHD and CHD permits to read:

"No later than two years of the permit effective date, the permittee must establish and promote an appropriate method of ~~storm water citizens hotline telephone~~ to receiving, tracking and considering information submitted by the public regarding stormwater concerns from the public; appropriate methods may include, but are not limited to, a telephone hotline, email, or website reporting."

26. **Comment regarding Part II.B.3.a, b, c, d, & e -Illicit Discharge Detection & Elimination program [IDDE]:** All commenters suggest that compliance dates in this Part should be extended to three years from the permit effective date. One commenter suggests that compliance with the mapping requirement should occur by the end of the permit term. The reasons identified for the extended time include complexity of the MS4 system, and the need for increased resources to complete the tasks.

Response: EPA agrees to revise Part II.B.3.a, b, c, d, & e to allow three years from the permit expiration date for operators to implement the IDDE program. The compliance date for dry weather screening in Part II.B.3.f -is no later than the the permit expiration date. Part II.B.3 and Table III in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas have been revised accordingly.

EPA declines to further extend the compliance dates beyond three years; EPA and

IDEQ have expected this work to be in progress as required through the Boise River Total Maximum Daily Load (TMDL) Implementation Plan.

27. Comment regarding Part II.B.3.a: (NHD): The term "jurisdiction" should be replaced with "Permit Area" as previously noted in Part I.A. of the permit.

Response: EPA agrees to make the revision to each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

28. Comment regarding Part II.B.3.b (NHD, CHD): Commenters suggest deleting the term "*effectively*" since this term does not define how to measure compliance with this portion of the permit. In addition, a Highway District does not have the authority to pass ordinances which provide that violations are crimes. See Article XII §2 Constitution of the State of Idaho. Commenters suggest the following underlined changes:

"Within [three] years from the effective date of this permit, the permittee must effectively ~~shall implement all reasonable regulatory controls authorized by law to~~ prohibit non-storm water discharges into its ~~system. MS4 through an ordinance or other regulatory mechanism to the extent allowable under State or local law.~~ The permittee must implement appropriate enforcement procedures and actions, including a written policy of enforcement escalation procedures for recalcitrant or repeat offenders."

Response: EPA declines to revise the language as suggested by the commenter. As previously noted, EPA understands the powers of local highway districts under Idaho law, and the proposed language "to the extent allowable under State or local law" accommodates this situation. EPA will assess whether a permittee accomplishes this requirement by reviewing 1) the written description of how the operator implements its existing powers under State law; 2) evaluating the written policy of enforcement procedures, and 3) reviewing the summary of the number and nature of inspections, formal enforcement actions, and/or other similar activities performed by the permittee. All of these items should be included in the Annual Report.

29. Comment regarding Part II.B.3.c (CHD, NHD): Revision of the non-storm water discharge section as requested in Comment #14 is necessary to address concerns with this requirement with respect to irrigation and waste-irrigation flows in roadside ditches that serve both as storm water systems and irrigation systems.

Response: See Response to Comment #14.

30. Comment regarding Part II.B.3.c (ACHD): Some provisions in this permit go beyond what is required of ACHD in their current Phase I MS4 Permit for the Boise Area. These new provisions will be expensive to implement. It should also be

noted that ACHD does not have the constitutionally delegated police powers of municipalities. Therefore, ACHD can only impose a civil penalty.

Response: EPA understands the powers of local highway districts under Idaho law, and the proposed language in Parts II.B.3, II.B.4, and II.B.5 stating "as allowed under State or local law" accommodates this situation.

At the time the Phase II regulations were enacted, it was noted that:

"EPA has no intention of directing State legislatures on how to allocate authority and responsibility under State law...If State law prevents political subdivisions from controlling discharge through storm sewers, EPA anticipates common sense will prevail to provide those MS4 operators with the ability to meet the requirements applicable to their discharges."

64 FR 68757, December 8, 1999.

All regulated MS4 operators, including local highway districts, must use all regulatory controls authorized by Idaho law to prohibit non-storm water discharges to the MS4, and to prevent the discharge of pollutants from the MS4 to the maximum extent practicable as required by other provisions of this Permit.

31. **Comment regarding Part II.B.3.d- MS4 mapping (CHD, N, M).** The first sentence of this section should include "...within the Permit Area" for clarification since the mapping does not include all the area within the jurisdictional boundaries. One commenter requests that private snow disposal sites be excluded from the list of locations to be shown on the map unless specifically identified to contribute runoff to the MS4 system, and requests clarification why such sites are to be included on a MS4 system map. Due to the complexity of the MS4, one commenter requests to be given until the permit expiration date to complete their map.

Response: EPA declines to make the changes to this Part as requested by the commenters. All requirements of this permit are effective within the permit area described in Part I.A, which does not need repeating in this Part.

EPA will clarify this Part in all eight of the Phase II MS4 permits for the Nampa and Boise Urbanized Areas that the locations of "permittee owned or operated facilities, (including all maintenance/storage facilities), and permittee owned or private snow disposal sites" are expected to be indicated on the map. See also Response to Comment #19.

The intent of mapping the snow disposal sites and their proximity to receiving waters (or the MS4) is to allow EPA and the permittee to understand where such inputs to the MS4 are located. Moreover, since snow melt from snow piles can be

a significant source of pollutants, EPA is using its discretion to require the location of both permittee-owned and private snow disposal sites on the required MS4 map. If snow melt from a snow disposal site does not discharge to the MS4, the location does not need to be located on the map.

EPA declines to extend the compliance date for producing the MS4 system map; EPA and IDEQ expected that permittees have been working on the map in accordance with the TMDL Implementation Plan.

32. Comment regarding Part II.B.3.e – Illicit discharge education (CHD, NHD): The term "hazard" implies a personal danger and should be replaced with "negatively impacts to the environment".

Response: Household hazardous waste and illegal dumping of materials to MS4s or receiving waters can pose a risk to human health and the environment. The purpose of this requirement is to instruct members of the public about these hazards. EPA declines to make the revision as requested.

33. Comment regarding Part II.B.3.f - Detecting illicit discharges (CHD, NHD, M, C, N): Commenters suggest that irrigation return flow and agricultural stormwater runoff should be exempt from this requirement if discovered during dry weather screening because these discharges are allowable non-storm water discharges. Other commenters request guidance to determine the parameters to be utilized to test dry weather flows, and ask whether the permittee can select the parameters. Commenters also request a more realistic number of outfalls to be screened by the permit expiration date, and suggest 20% of total outfalls, rather than 50% as proposed.

Table A: Number of outfalls as identified in Public Comments.

	Number of outfalls	Miles of MS4
Caldwell	380	
Nampa	More than 300	
ACHD	992	576

Response: EPA has added irrigation water to the list of "allowable non-storm water discharges." See Response to Comment #14. Any discharges of irrigation water discharging during dry weather from the MS4 should be identified as such by the permittee. The permittee is not required to eliminate such discharge from the MS4.

Permittees may select the parameters to test dry weather flows, EPA suggests that the permittees consult the Center for Watershed Protection's *Illicit Discharge Detection and Elimination A Guidance Manual for Program Development and Technical Assessments*, for guidance regarding selection of appropriate parameters for dry weather testing. This guidance is found on EPA's website at http://www.epa.gov/npdes/pubs/idd_e_manualwithappendices.pdf.

EPA agrees to revise the target number of outfalls to be screened and has revised each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas to reflect that 20% of the outfalls must be screened for dry weather discharges during the permit term.

34. **Comment regarding Part II.B.3.g - Inventory of industrial discharges (M, N, CHD, NHD):** Commenters suggest revisions to clarify that the inventory must be done only within the permit area, and must only identify those facilities which discharge to the MS4. Commenters also request that EPA delete the requirement to report the NPDES permit status of an identified industrial facility because determining NPDES permitting status is EPA's responsibility.

The Highway Districts further note that they have no regulatory authority over direct discharges by industrial facilities into waters of the United States nor would such discharges have any connection to the MS4. Therefore, they propose that the text be revised to include only those industrial facilities directly discharging into the regulated MS4.

Response: All requirements of this permit apply within the permit area. EPA agrees to make the following changes to the text of this Part in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas to clarify that this inventory is required only within the permit area (i.e., the Urbanized Area) for industrial facilities that discharge storm water to the MS4:

"Within three years from the effective date of this permit, the permittee must inventory all industrial facilities that discharge directly to the permittee's MS4 ~~or directly to waters of the United States located within the permittee's jurisdiction~~ and submit this inventory as part of the corresponding Annual Report. The types of industrial facilities that must be inventoried are set forth in 40 CFR § 122.26(b)(14)(i-ix). This inventory must include the name and address ~~location of the facility, and the location of its outfall, and the NPDES permit status for its storm water discharges.~~"

35. **Comment regarding Part II.B.4 - Control of Runoff from Construction Sites (C, N, CHD, NHD):** Commenters suggest that the compliance date for each Subpart should be changed to at least 3 years from permit effective date, and Table III corrected accordingly. Minor punctuation corrections are identified as well.

Response: EPA agrees to make the changes as requested to each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

36. **Comment regarding Part II.B.4.a (N):** How will EPA notify the permittee of any such waivers granted?

Response: EPA posts such waiver information on its national Storm Water Notice

of Intent website (www.epa.gov/npdes/stormwater/noisearch). Because this is an indirect means of communicating with the permittee, and EPA does not have any alternative means of providing the information, EPA has deleted the language related to the waivers from each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

37. Comment regarding Part II.B.4.g (M, ACHD, N, NHD, CHD) : The language of this section appears to require the inspection of all construction projects for appropriate erosion/sediment/waste control practices rather than projects meeting the threshold criteria for projects of one acre of land disturbance or greater. Commenters request that additional language be added to clarify this requirement

One commenter adds that the once-per-season inspection requirement for all construction sites may prove to be costly, burdensome, and resource intensive. The ACHD NPDES Phase I permit requires inspection of construction sites are prioritized to address and emphasize those that have the most potential for water quality impacts. Commenter recommends deleting the text requiring inspection of all construction sites.

Response: EPA acknowledges that inspection of all construction sites within the permittee's jurisdiction may present resource challenges; however, inspection and enforcement of the permittee's requirements is a primary means of ensuring that pollutants are not discharged to the MS4. EPA agrees to revise the permit text to identify that only large construction sites (>5 acres) must be inspected by the permittee, and that the permittee must develop a written prioritization policy for when it will inspect construction sites disturbing less than 5 acres. The permit text in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas has been revised in the following manner:

*"Within three years from the effective date of this permit, the permittee must develop and implement procedures for site inspection and enforcement of control measures established as required in Parts II.B.4.c and d, including a written policy of enforcement escalation procedures for recalcitrant or repeat offenders. Within three years from the effective date of this permit, the permittee must inspect all construction sites in their jurisdiction *disturbing five (5) acres or more* for appropriate erosion/sediment/waste control practices at least once per construction season. *Within three years from the permit effective date, the permittee must also develop a written policy identifying how construction sites disturbing less than 5 acres will be prioritized for inspection.*"*

38. Comment regarding Part II.B.5.a & b, d, and e- Runoff Control from New Development/Redevelopment- deadlines (M, N): The commenters request that the compliance date for these requirements be extended to at least four years from the permit effective date.

Response: EPA agrees and has corrected the dates in this Part and Table III

for each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

39. **Comment regarding Part II.B.5.a (NHD):** To clarify the permit area, the Commenter requests the language be revised to read "...that result in discharge into the permittee's MS4 within the Permit Area." The Highway District's MS4, as defined in the draft permit, includes highways and drainage that are outside of Urbanized Area and not intended to be included in the coverage of this permit.

Response: EPA agrees and makes the change to this Part in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

40. **Comment regarding Part II.B.5.c & d (M, N):** Commenters request that the compliance date for this requirement be extended to the permit expiration date, and that the text be amended to clarify that private storm water management controls not connected to the MS4 are not covered by this requirement.

Response: EPA agrees to extend the compliance date for this Part, and has revised each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas accordingly. EPA clarifies that the permittee must ensure the proper operation and maintenance of only for those stormwater management controls which are connected to the permittee's MS4.

41. **Comment regarding Part II.B.5.c (CHD):** To clarify that the requirement applies only to newly constructed facilities within the permit area as previously noted, this requirement should have the language revised to read:

" ... all permanent storm water management controls for newly developed project areas greater than or equal to one acre in size located within the Permit Area."

Response: For clarity, EPA agrees to make this change to each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

42. **Comment regarding Part II.B.6.a, b, & c - Good Housekeeping for Municipal Operations (M):** Commenter requests that the compliance date for this requirement be extended to four years from the permit effective date. Such a compliance schedule was previously allowed by EPA for the City of Pocatello MS4 permit (#IDS028053)

Response: EPA agrees, and has revised the date in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

43. **Comment regarding Part II.B.6.a (CHD, NHD):** Commenters request that the term "jurisdiction" be replaced with "Permit Area" to clarify that the activity only needs to occur within the permit area.

Response: The commenters are correct that the activity only needs to occur within the Permit Area set forth in the NPDES Permit. As such, EPA agrees to make the revision as requested in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

44. **Comment regarding Part II.B.6 (NHD):** Commenter suggests that because a Highway District is not a municipality, the word "Municipal" should be replaced with either "roadway" or "agency" through this section and the entire permit.

Response: 40 CFR 122.2 defines a "municipality" as "a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of CWA." Therefore, under the federal CWA regulation, a highway district is a "municipality" because it is a public body created under State law with jurisdiction over the disposal (or discharge) of storm water into waters of the U.S. EPA declines to replace the term "municipal" with "Highway District."

45. **Comment regarding Part II.B.6.b (NHD):** Commenter suggests the term "*optimum maintenance practices*" is undefined, and should be replaced with "*best management practices*," which is defined in the permit.

Response: EPA agrees, and has made the revision in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

Comments Related to Part II.C – Discharges to Water Quality Impaired Receiving Waters

46. **Comment regarding Part II.C.2 (M, N, C, LBWC):** Commenters request clarification of this Part. It appears EPA is indirectly requiring testing of all discharges within the permittees' MS4s. Such testing is cost prohibitive, and is inconsistent with the monitoring requirements in Part IV. The term "any parts of the MS4 and 303(d) listed water bodies" implies that continuous monitoring is required at all discharge points in all of the receiving waters. In addition, two commenters state that "pollutant(s) of concern" are too broadly defined; specific nutrient(s) of concern (i.e. total phosphorus as opposed to nitrogen) should be listed as well as specific bacteria (i.e., fecal coliform as opposed to enterococcus) as appearing in the Lower Boise River TMDL.

Response: This section does not require continuous monitoring at all discharge points. This section is intended to direct all permittees to tailor their storm water management activities to specifically address the pollutants of concern as listed in the Lower Boise River TMDL. At a minimum, the permittees should qualitatively determine the effectiveness of their storm water management program activities to

reduce the discharge of the pollutants of concern from their MS4. Prioritizing and focusing the various activities (i.e., public education, construction runoff control, good housekeeping, etc) to target and eliminate possible inputs of sediment, nutrients, and bacteria to their MS4.

To clarify the pollutants of concern, EPA has revised this Part in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas to specify total phosphorus, and *E.coli* as the "pollutants of concern."

Although the Lower Boise TMDL was developed for bacteria at a time when the Idaho water quality standard was identified for fecal coliform, in 2000 IDEQ revised its water quality standards for bacteria indicators from fecal coliform to *E.coli*. IDEQ now uses *E.coli* sampling to review progress toward meeting TMDL allocation for bacteria in water bodies where TMDLs were previously developed using fecal coliform data. The Idaho water quality standard for *E.coli* is a geometric mean of one hundred twenty-six (126) *E. coli* organisms per one hundred (100) ml, based on a minimum of five (5) samples taken every three (3) to seven (7) days over a thirty (30) day period.

47. Comment regarding Part II.C.3 (M, N): One commenter requests the compliance date be extended to 17 months from the permit effective date, with an update once per year thereafter to coincide with the Annual Report

Another commenter states that because many of the controls identified in Part II.B provide two or three year periods to develop, it is likely that the first Annual Report will summarize the status of getting all the measures addressed, funded, and in place if required for year one. Terms such as "ensure", MEP and "violation" will be difficult to assess and confirm after only one year into the plan. Additionally, achieving MEP may take several years or more as suggested by Part II.B. The commenter therefore recommends adding specific revisions to this Part

Response: EPA agrees to revise the text in a manner suggested by the commenter, but retains the requirement to report annually on the manner in which the SWMP activities are being targeted to control the pollutants of concern.

"Maximum extent practicable" is the statutory standard that establishes the level of pollutant reductions that operators of regulated MS4s must achieve. EPA envisions application of the MEP standard as an iterative process; MEP should continually adapt to current conditions and BMP effectiveness and should strive to attain water quality standards. See EPA discussion at 64 FR 68754, December 8, 1999. EPA has elected to include this provision, in combination with other provisions of the proposed MS4 permit(s), to identify and track the permittee's incremental implementation of its SWMP.

The text of each of the eight Phase II MS4 permits in the Nampa and Boise Urbanized Areas will be revised to read as follows:

"The permittee's Annual Report must include a description of how the activities in each of the minimum control measures in Part II.B will be targeted by the permittee to control the discharge of pollutants of concern..... This discussion must specifically identify how the permittee will evaluate and measure the effectiveness of the SWMP to control the discharge of the pollutants of concern. For those activities identified in Part II.B requiring multiple years to develop and implement, the permittee shall provide updates on progress to date. The permittee must submit this description of the SWMP implementation to EPA and IDEQ as part of the first Annual Report required in Part IV.C, and update it annually in subsequent Annual Reports."

48. Comment regarding Part II.C.3 (ACHD): The permittee is required to "ensure to the maximum extent practicable that the MS4 discharges will not cause an in-stream violation of the applicable water quality standards." Commenter requests that EPA acknowledge that implementation of an approved TMDL will satisfy this condition, and recommends the following text:

"The implementation of an EPA approved TMDL is considered as meeting the maximum extent practicable."

Response: EPA has revised the sentence referenced by the commenter; see Response to Comment #16. EPA declines to add the text as requested by the commenter. The TMDL Implementation Plan states that "Plan implementation is based on a schedule related to the proposed timeframes associated with the Phase II stormwater requirements." (See *Implementation Plan for the Lower Boise River Total Maximum Daily Load*, page 28, found online at http://www.deq.idaho.gov/water/data_reports/surface_water/tmdls/boise_river_lower/boise_river_lower_plan_noapps.pdf). IDEQ has concurred with EPA that implementation of a Storm Water Management Program as outlined in each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas is consistent with the TMDL Implementation Plan.

The SWMP actions and activities outlined in the permit provide the structure intended by the TMDL Implementation Plan. Adding the text requested by the commenter would inappropriately create a circular reference between the permit requirements and the TMDL Implementation Plan for urban and suburban runoff discharges to the Lower Boise River. The SWMP must be designed and implemented to reduce the discharge of pollutants from the MS4 to the maximum extent practicable. It is the SWMP itself that accomplishes the reduction of pollutants from the MS4 to the maximum extent practicable. Therefore, it is not implementation of the TMDL that meets the MEP standard. It is the permittees implementation of the SWMP through compliance with this permit that meets the MEP standard.

49. Comment regarding Part II.C.3 (C): Commenter suggests changing the word "violation" in this Part to "exceedances."

Response: See Response to Comment #16.

Comment Related to Part II.F – SWMP Resources

50. Comment regarding Part II.F (N): Commenter points out that if EPA allows the permit effective date and associated compliance deadlines to be extended the permittees can obtain adequate and appropriate resources for the permit activities.

Response: Comment noted. EPA has extended many compliance dates as requested by the commenters. See Response to Comments #3 and 4.

Comments Related to Permit Part III – Schedule for Implementation & Compliance

51. Comments regarding Table III (M, ACHD, C, N, CHD, NHD, ITD3): Each commenters has identified various revisions and typographical errors in Table III based on the previous comments.

Response: EPA has made appropriate changes to Table III as requested by the commenters.

52. Comment regarding Table III reflecting Part II.D & IV C (CHD, NHD). Commenter requests that compliance dates be revised to read "One year and four months from the effective date ..." This would allow adequate time to prepare the annual report after completion of each full permit year and, consistent with Comment 2, allows the District's funding cycle and permit goals to coincide. Part II.D and IV.C should be revised so that the compliance date is the second Friday in February at least one year and four months from the effective date of the permit. This comment reinforces our third comment regarding setting the effective date to coincide with NHD's fiscal year and allowing time to consolidate the report after meeting the submittal requirement of our other existing reporting requirements.

Response: See Response to Comment #68.

Comments Related to Part IV - Monitoring, Recordkeeping and Reporting

53. General Comments regarding the Monitoring Requirements (LBWC): "Pollutant(s) of concern" are too broadly defined in the draft permits; the Lower Boise River TMDLs and implementation plans describe the impairment of water

bodies in the watershed by total suspended sediments (TSS), *E. coli*, and total phosphorus.

Response: See Response to Comment #46.

54. Comment regarding Part IV.A.2 (N, ACHD, ITD): Compliance dates for the Quality Assurance Plan and the monitoring plan are inconsistent throughout the permit. Commenter suggests that the Quality Assurance Plan and the monitoring plan should be developed and completed concurrently. The sampling location and procedure details that are part of the monitoring plan are a part of the Quality Assurance Plan. Commenters request between 270 days – 12 months to complete the Quality Assurance Plan and the monitoring plan and provide written notice to EPA and IDEQ.

Response: EPA agrees and has revised the compliance date for completion of both the QAP and monitoring plan to one year from the permit effective date.

55. Comment regarding Part IV.A.2.a, b, & c (N): Estimating pollutant loading, assessing the effectiveness and accuracy of control measures, and identifying and prioritizing portions of the MS4 will require monitoring beyond what is proposed by this permit. The commenter requests that EPA confirm that the permit's monitoring and sampling recommendations do not restrict the permittee from developing their own monitoring and sampling plan as long as minimum permit requirements are met.

Response: EPA agrees, and clarifies that the permit does not restrict the permittee from developing additional monitoring plans. Permittees should note that Part IV.C.2 of the Permit requires that any/all information collected or analyzed during the permit term must be included in the Annual Report. This information includes any additional monitoring/sampling data collected beyond what the Permit requires.

56. Comment regarding Part IV.A.5 (ACHD, ITD3): Does the term "Storm Water Discharge Monitoring" refer to discharges from the storm drain system in general (dry and wet weather) or does it apply only to storm event monitoring? The only mention of "storm event" is in Table IV. A. footnote 2. If the requirement is intended to consist of storm event monitoring, do the same requirements of storm event duration, antecedent dry period, and minimum rainfall amounts stated in the Phase I permit still apply? Commenter recommends revision to the text in Part IV.A.5. to clarify that sampling is intended for discharges occurring during storm events. In addition, "storm event" should be defined as in Phase I Boise Area MS4 permit, i.e., 72 hours antecedent dry period from previously measureable [greater than 0.1 inch rainfall] storm event; and storm event is greater than 0.1 inches in magnitude.

Response: Storm water discharge monitoring refers to storm event sampling during wet weather. A definition of "storm event" will be included in Part VII of

each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas, which is consistent with definition of storm event outlined by the commenter.

57. Comment regarding Part IV.A.5.a (M, N, C): Commenters request that EPA clarify this requirement. Without ongoing flow monitoring or sampling of every storm event, it is difficult to determine the outfall with the "largest or highest flow" by volume. Alternatively, there may be physical barriers associated with the specific outfall which would make sampling difficult. One commenter interprets this requirement to sample outfalls with the largest or highest flow "capacity." One commenter suggests adding the following phrase to the sentence at the end of this section: "based on an estimate by the permittee and is constructed in a manner conducive to proper sampling."

Response: EPA has revised the permit text to indicate that sampling must occur at outfall(s) discharging to the receiving water indicated in the Permit. For Middleton, sampling must occur at a minimum of one outfall discharging to the Willow Drain. EPA clarifies that the permittee can select which outfall(s) to be monitored based on site specific characteristics; the rationale for the outfall selection must be identified in the monitoring plan.

58. Comment regarding Part IV.A.5.b (N): To provide adequate time for this program, the City requests extension of this compliance date to "Not later than 24 months." This revision should also be made in Table IV.A.

Response: EPA agrees; for consistency, EPA will revise the comparable compliance date for this Part in the Nampa, Caldwell, Middleton, ACHD and ITD3 Permits.

59. Comment regarding Table IV.A Footnote 2, reading sampling frequency (M, ACHD, N, ITD3, LBWC): Sampling during storm events in June-July and Sept-Oct may be extremely difficult due to long extended arid months typically experienced in the area. Commenters suggest modifying the language to provide more flexibility in the sampling periods and allow samples to be taken in other months as necessary provided that 4 samples are collected in a calendar year. One commenter suggests that if sampling cannot occur due to lack of summer rainfall, the permittee should note this in the Annual Report. Commenters suggested the following language:

"A minimum of four (4) samples must be collected in a calendar year. Monitoring should occur within the following periods: March — April, May — June, July — August, September — October. If samples cannot be collected due to lack of rainfall in these periods, samples may be collected in other months as necessary to meet the minimum of four (4) samples."

Response: EPA agrees to make the text revision to the Caldwell, Nampa, Middleton, ACHD and ITD3 permits as suggested above by the commenters.

EPA clarifies that a minimum of 4 samples each calendar year must be collected. If sampling cannot occur due to lack of rainfall, a minimum of 4 samples must still be collected within each calendar year.

60. Comment regarding Table IV.A Footnote 2, regarding Interval from start of storm event (M, ACHD, C, ITD3): An ACHD evaluation of storm events reveals that most storms occur in the evening and early morning hours. Commenters suggest that the sampling timeframe after the beginning of a storm event should be extended from 30-60 minutes to two hours, as currently allowed in the Phase I permit, to accommodate the logistical difficulty in getting staff in place to collect the samples.

Response: EPA agrees and has revised each of the ACHD, ITD3, Middleton, Nampa and Caldwell permits.

61. Comment regarding Table IV.A (ITD3): Commenter notes that the Permit expects the permittee to reduce pollutants to the MEP. However, county land use authority agencies do not own or operate an MS4, but they approve development of MS4s and waste water treatment plants. County developments approved outside the MS4, but within its watershed, can affect a downstream MS4 and change baseline water quality. As such, it will be difficult to control the water quality baseline parameters as new developments are added to the system which the District has no control over. ITD requests the term of "MS4" be redefined to include urbanized developments occurring in unincorporated areas so we are regulated similarly.

Response: The definitions of "MS4" and "municipal separate storm sewer" are found at 40 CFR 122.26(b)(8) and are contained in each permit in Part VII. EPA Region 10 cannot revise the regulatory definition of MS4 through a permit, and, therefore, declines to revise the permit as requested. Developments approved under County authority are currently outside of EPA's permitting authority jurisdiction. As previously explained, EPA's MS4 permitting authority only pertains to those MS4s located within a defined Urbanized Area. EPA may designate other sources as needing permit coverage based on petitions from third parties or based on other factors (see 40 CFR 122.26(f), and 40 CFR 122.26(a)(9), respectively). EPA has not received any petitions to designate additional sources within the Nampa or Boise Urbanized Areas.

62. Comment regarding Part IV.A.6 (M, N): Commenters note the reference to "co-permittees": in this Part is inappropriate.

Response: EPA has corrected the typographical error.

63. Comment regarding Part IV.A.6 (M, N): Commenters also request that the deadline for the QAP be extended to one year from the permit effective date, and reflected in Table III.

Response: See Response to Comment #54.

64. Comment regarding Part IV.B.1 (M): This section refers to Discharge Monitoring Reports (DMRs) form – commenter requests that the reference to DMRs be removed from this section since the data will be included as part of the Annual Report.

Response: EPA agrees and has deleted the reference to DMRs from this Part.

65. Comment regarding Part IV.C.1 – Storm Water Discharge Monitoring Report (C, M): Compliance dates should be changed to 3 years from permit effective date. Since all available stormwater discharge monitoring data will be submitted with the Annual Report, one commenter suggests that submittal requirement stated in this section should be omitted to avoid confusion or possible conflict with other sections of the permit.

Response: EPA has corrected the compliance date as suggested by the commenter. EPA has decided not to omit the submittal requirement because Part IV.C.1 identifies the specific monitoring related information to be submitted as well as the monitoring results.

66. Comment regarding Part IV.C.1 d (ACHD, N, M, ITD3): Commenters request clarification whether daily and/or monthly loads are required for months when storm water discharges were not sampled? Does this load calculation include wet and dry weather discharge loads or just wet weather discharge loads? One commenter requests that this requirement for estimating of daily and/or monthly average and cumulative pollutant loads for each pollutant be omitted, because the sampling data to be collected will not be sufficient to represent average or cumulative pollutant loading. Two commenters suggest the following clarification:

"For the months sampled, estimates of the wet weather daily and/or monthly average pollutant loads for each pollutant at each sample location."

Response: EPA agrees to clarify this Part, and the associated reference to loads in Part IV.C.2.b, to specify that the permit requires a estimated monthly load during the months when stormwater discharges are sampled; the text has been revised as follows:

"For the months sampled, estimates of the wet weather daily and/or monthly average pollutant loads for each pollutant at each sample location."

67. Comment regarding Part IV.C.1.e (ACHD, N, C, ITD3): Commenters request clarification regarding whether the "cumulative" load as proposed means an annual load. One commenter recommends a change in the text to state:

"An annual cumulative estimate of pollutant loading for each

parameter at each sample location."

Response: EPA agrees, and has revised the text of the ACHD, ITD3, N, C, and M Permits as suggested by the commenter.

68. **Comment regarding Part IV.C.2- Deadline for the Annual Report (C, ITD, ACHD, M, N, NHD, CHD):** Commenters suggest that the deadline for the Annual Report should be linked to the end of the permittees' fiscal years and the requested permit effective date of October 1 (see Response to Comment #4). Commenters suggested between 90 - 150 days after October 1 as the due date; two commenters request clarification that the first Annual Report covers the second full period (October 1 — September 30) after the permit effective date.

Response: This comment is relevant to all eight of the Phase II MS4 permits for the Nampa and Boise Urbanized Areas. EPA agrees revise Part IV.C.2 as indicated below to identify a specific date (January 15) by which the Annual Report must be submitted; the report will reflect work done in the previous 12 month reporting period ending October 15th.

"No later than January 15 of each year beginning in year 2011, the permittee must submit an Annual Report to EPA and IDEQ. The reporting period for the first Annual Report will be from the effective date of this permit through October 15, 2010. The reporting period for all subsequent annual reports will be the 12 month period ending October 15th of the previous calendar year. Copies of all Annual Reports must be made available to the public, at a minimum, through a permittee-maintained website."

69. **Comment regarding Part IV.C.2.d (ACHD):** The permit does not make any meaningful distinction between "complaints" and "enforcement actions" received from other regulatory agencies. For clarity, delete text related to "informal" documents or similar actions, as follows:

"Such actions include, but are not limited to, formal ~~or informal~~ warning letters, notices of violation, field citations, or similar formal actions."

Response: EPA agrees to make this revision to each of the eight Phase II MS4 permits for the Nampa and Boise Urbanized Areas.

Comments Related to Permit Parts V, VI, and VII

70. **Comment regarding Part V.G (NHD, CHD, M):** The commenters request clarification of whether this section requires EPA and IDEQ approval for all MS4 system changes or extensions? Any system change or improvement could change the pollutants discharged, even if such improvements are incorporating best management practices. For example, the City of Nampa will be periodically

annexing portions of NHD. Would these annexations then result in a physical alteration of the system requiring notification? If so, this provision would be unduly burdensome to the permittees. If necessary, notification may be accomplished annually within the required reporting process.

Response: Part V.G. of the Permit is considered a "standard permit condition" that is required to be included in all NPDES permits pursuant to the NPDES regulations at 40 CFR §122.41(l)(1). EPA cannot revise the text of a standard permit condition. EPA clarifies that Part V.G. does not require approval from EPA or IDEQ for planned changes to the MS4. Annexations of existing MS4s by one operator from another operator are not considered "physical changes or additions to the permitted facility" as envisioned by this regulation. If the operator has any questions as to whether something needs to be reported as a planned change, the operator should contact EPA for clarification.

71. **Revisions to Part V.B:** On December 11, 2008, EPA finalized the Civil Monetary Penalty Inflation Adjustment Rule as mandated by the Debt Collection Improvement Act of 1996. (See 73 FR 75340, December 11, 2008.) This rule adjusts for inflation the statutory civil monetary penalties that may be assessed for violations of EPA administered statutes and implementing regulations.

EPA has revised Part V.B to reflect the adjusted penalties.

Comments Relevant to the City of Caldwell

72. **Comment (Pioneer Irrigation District [Irrigation District]):** The Irrigation District notes that the Permit is clear that the scope is expressly limited to property over which Caldwell have legal jurisdiction or authority.

Response: Comment noted

73. **Comment (Pioneer Irrigation District):** The Irrigation District has broad rights and responsibilities as an irrigation entity. See Idaho Code §§ 42-1202, 42-1203, 42-1204, 42-1207, 42-1208, and 42-1209. These rights and responsibilities prohibit any encroachments into the Irrigation District's easements and rights-of-way without express written authorization. Caldwell has constructed and authorized the construction of storm water discharge outfalls into these easements, rights-of-way, etc. This construction interferes with the purpose of these facilities and interferes with the proper operation and maintenance of these facilities. Therefore, the Irrigation District requests that EPA clarify in the Permit that the Permit issuance does not grant to Caldwell any jurisdiction or authority to take over these facilities. The Irrigation District suggests the addition of the following language: "No discharges are authorized by this Permit to constructed waterways, owned, operated or maintained by irrigation entities."

Response: The issue appears to be the Irrigation District's concern over whether this Permit allows Caldwell to obtain some jurisdiction over the Irrigation

District's irrigation canals and other such facilities through the issuance of the Permit. EPA understands that there is ongoing litigation between the Irrigation District and Caldwell that concerns this exact issue. Section VI.H of the Permit makes it clear that the Permit does not convey this type of property right or jurisdiction. Since the Permit is clear that the Permit is not authorizing such property rights or jurisdictional rights, EPA declines to add the Irrigation District's suggested language.

74. **Comment (Pioneer Irrigation District):** The Irrigation District believes that Caldwell's municipal storm water discharges compromise water quality because the discharges adversely impact the designated uses of the irrigation canals.

Response: Section I.C.2 of the Permit has been revised as a result of public comment to state that "[t]he permittee is not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above Idaho water quality standards." Once the Permit is issued, if the permittees' discharges into waters of the U.S. contribute to an in-stream excursion above an Idaho water quality standard, then the permittee would be in violation of the Permit.

75. **Comment (Pioneer Irrigation District):** The irrigation canals and facilities owned by the Irrigation District were constructed for the delivery of seasonal irrigation and agricultural return flows. They were not designed to accept municipal storm water. The addition of storm water to the irrigation canals prevents the Irrigation District from performing routine off-season maintenance and the increase of storm water due to an increase in impervious surfaces causes an increased risk of flooding. The Irrigation District therefore states that the Permit must not authorize use of the permittee's SWMP because it increases the risk of property damage and poses a danger to human life and aquatic wildlife. Moreover, it impermissibly shifts the liabilities and burdens from the permittees to the Irrigation District.

Response: EPA understands the Irrigation District's concerns regarding excess discharges into the irrigation canals and other Irrigation District facilities. However, all municipal storm water permits require the permittee to implement a storm water management program (SWMP). The SWMP is the heart of the MS4 permit and it requires the permittees to implement BMPs that will reduce pollutants in the storm water to the maximum extent practicable. EPA does not have the authority to eliminate the SWMP from the Permit. *See* 40 C.F.R. §§ 122.26 & 122.34. *See also* Response to Comment #73 regarding the liabilities and burdens to the Irrigation District.

76. **Comment (Pioneer Irrigation District):** Caldwell has allowed developers to install multiple points of municipal storm water discharge into the Irrigation District's irrigation and drainage facilities without authorization. This practice jeopardizes the Irrigation District's protections under the Irrigation return flow.

Response: Irrigation/agricultural return flows are excluded from regulation under the NPDES program. See 40 C.F.R. § 122.3(f). Storm water discharges from certain MS4s, construction sites greater than one acre, certain industries, and other designated storm water sources require an NPDES permit. 40 C.F.R. § 122.26. Irrigation return flows are exempt from storm water permit coverage and the commingling of irrigation return flow and storm water does not automatically revoke the exempt status of the irrigation return flow. See 55 Fed. Reg. 47990, 47996 (Nov. 16, 1990). The MS4 discharges may be authorized by a permit at the point they discharge to receiving waters or at the point they discharge into a separate conveyance. If the MS4 discharge is permitted before it is commingled with the irrigation return flow, the operator of the conveyance transporting the commingled flow does not need its own NPDES permit for the commingled discharge and the irrigation return flow would retain its exemption. In other words, if the MS4 discharges into the Irrigation District's irrigation facilities are permitted, then the irrigation return flow exemption would remain. It should be noted, however, that if the MS4 discharge or other NPDES regulated discharge is unpermitted when it enters the Irrigation District's facilities, then the Irrigation District may need to be authorized to discharge under a NPDES permit. Therefore, if there are NPDES regulated point source discharges into the Irrigation District's facilities, it would be in the Irrigation District's best interest to ensure that those point source discharges are permitted through an appropriate NPDES permit such as the City MS4 Permit at issue here. See also letter from James Hanlon, Director, EPA Office of Wastewater Management, to William Schweitzer, Director, ACHD, dated July 20, 2007.

77. **Comment regarding Parts II.B.1 and II.B.2 (Pioneer Irrigation District):** Parts II.B.1 and II.B.2 require Caldwell to develop and implement a public education program and involve interested stakeholders in the development of a SWMP. The Irrigation District does not believe that Caldwell has demonstrated that they will adequately comply with this Permit provision. The Irrigation District does not believe that the issuance of the Permit will foster cooperation or more respect for the Irrigation District's rights and obligations. The Irrigation District requests that EPA modify the Permit to require the permittee to more effectively educate and address stakeholders about the environmental impacts of municipal storm water discharges and about the impacts of these discharges upon the legal rights of others.

Response: The Permit requires the City to develop and implement a public education program and to involve interested stakeholders in the development of the SWMP. If the permittee does not comply with the provisions of the Permit, the permittee would be in violation of the Permit.

78. **Comment regarding Part II.B.3 of the Permit (Pioneer Irrigation District):** Part II.B.3 of the Permit requires the permittees to develop and implement illicit discharge detection and elimination activities. Over the past years, the City has

made no effort to meaningfully regulate illicit discharges as it pertains to urban storm water, despite clear danger and complaints. The Irrigation District believes that this evidences lack of good faith. The Irrigation District requests EPA's acknowledgement that Caldwell's improper utilization of the Irrigation District's property, including illicit discharge detection and elimination activities, will not be authorized or condoned by EPA's issuance of the Permit.

Response: The Permit requires the permittees to develop and implement an illicit discharge detection and elimination program. Upon issuance of the permit, if the City fails to implement such a program, the City would be in violation of their Permit and could be subject to EPA enforcement action. With regard to the comment concerning the Irrigation District's property rights, see Response to Comment #73.

79. **Comment regarding Parts II.B.4 and II.B.5 of the Permit (Pioneer Irrigation District):** Parts II.B.4 and II.B.5 of the Permit requires the City to develop and implement construction site control activities and post-construction storm water management in new development and redevelopment. The City's administration and implementation of the current SWMP concerns the Irrigation District because in the Irrigation District's view the City does not take into consideration other stakeholders with regard to these components of the SWMP. The Irrigation District requests that EPA consider how the existing narrative limitations and requirements of the Permit will incentivize a more pro-active approach to construction site control and post-construction storm water management when EPA approves continued development of a SWMP that provides for unauthorized storm water discharge onto the private property of others. The Irrigation District further requests EPA's acknowledgement that EPA is not authorizing the permittees to utilize the Irrigation District's property in construction site control activities or in the implementation of post-construction storm water management.

Response: This is the first NPDES permit issued to the City for MS4 storm water discharges. To that extent, this Permit requires the City to develop and implement construction site control activities and requirements for post-construction storm water management in new development and redevelopment. If the City fails to implement these required programs, the City would be in violation of their permit and could be subject to enforcement action. With regard to the Irrigation District's property right concerns, see Response to Comments #73.

80. **Comment (Pioneer Irrigation District):** While EPA clearly has the authority to require the City's compliance with the Permit, it does not have the authority to require Pioneer Irrigation District's compliance with the Permit or to preempt state law governing the Irrigation District's rights and obligations.

Response: The Permit is being issued to the City of Caldwell. Pioneer Irrigation District is not named as a permittee in any of the eight NPDES permits issued to MS4 operators in the Boise or Nampa Urbanized Areas, and is not required to

comply with the Permit requirements. Moreover, with regard to the Pioneer Irrigation District's rights and obligations, see Response to Comments #73.

81. Comment regarding the comments submitted to EPA by Pioneer Irrigation District, dated October 30, 2008 (Caldwell): EPA should reject Pioneer's request for certain language to be added to the Permit, as such requests go beyond the scope of the permit and EPA's authority. The City does not agree with Pioneer Irrigation District's contention that the permit must include a statement that requirements imposed on the City of Caldwell through the NPDES permit "are not an affirmative grant of power over Pioneer or its facilities."

The City also does not agree with Pioneer Irrigation District's request that the permit state that no discharge authorized by this permit be allowed to "constructed waterways owned, operated or maintained by irrigation entities. "

The scope and effect of an NPDES permit is already accounted for in Part VI.H and VI.J of the permit, and are consistent with 40 CFR §122.5. Pioneer's request to include certain permit restrictions goes too far. Caldwell's right and ability to discharge stormwater flows into canals and drains also used by Pioneer arises from other sources and authorities and cannot be abrogated or affected by EPA in this Permit.

Response: EPA must include and review Pioneer Irrigation District's comments pursuant to 40 CFR 124.11. EPA recognizes that the City and Pioneer Irrigation District are currently in litigation concerning this issue. EPA is authorized to issue NPDES permits with conditions and limitations appropriate for the MS4 permit. See Section 402 of the CWA, 33 U.S.C. § 1342. The City submitted a NPDES permit application for discharges from its MS4 outfalls. EPA is authorizing the discharge from the City owned/operated MS4 subject to the conditions and limitations set forth in the Permit. EPA does not have the authority to prohibit discharges into "constructed waterways owned, operated or maintained by irrigation entities." EPA feels this matter should be resolved between the City and Pioneer Irrigation District.

82. Comment regarding Part I.B (Caldwell): At the end of existing Part I.B. the City recommends adding the following sentence:

"This permit also authorizes discharges of storm water and allowable non-stormwater discharges subject to the conditions of this permit when such discharges are commingled with flows or discharges from irrigated agriculture, agricultural stormwater runoff or othe discharges or flows with a valid NPDES permit exclusion under 40 CFR §122.3."

Response: EPA declines to add the sentence as requested. EPA feels the NPDES program exemptions provided in federal regulations in 40 CFR 122.3, combined with the City Permit provisions contained in Part I.C, are sufficient to authorize

such non-stormwater discharges through the City's MS4.

- 83. Comment regarding Part I.C (Caldwell):** The City suggests adding a new section, as Part I.C.5, to clarify the effect of this permit on NPDES exempt discharges, and suggests the following language:

"5. Effect of Permit on Valid Exemptions. Neither this permit nor discharges under the terms of this permit shall affect valid point source exemptions for return flows from irrigated agriculture and agricultural stormwater runoff or other valid NPDES permit exclusions under 40 CFR 122.3 when such exempt discharges commingle with discharges authorized by this permit."

The City believes this language is consistent with EPA policy, practice, and the Clean Water Act case law. Further, it specifically addresses Pioneer Irrigation District's contention that EPA's permit exposes Pioneer Irrigation District to liability under the Clean Water Act.

Response: EPA declines to edit the Permit as suggested by the City. Irrigation return flows and agricultural storm water runoff are exempt from NPDES permitting requirements. Specifically, CWA Section 502(14) defines a "point source" as "any discernible confined and discrete conveyance ... from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff." *See also* 40 CFR § 122.2. In a letter from EPA's Office of Wastewater Management dated July 20, 2007, to Ada County Highway District, EPA explained that "if the point source discharge is already subject to an NPDES permit (e.g., an MS4 permit) before it is commingled with the irrigation return flow, the operator of the conveyance transporting that commingled flow does not need its own NPDES permit for the commingled discharge.... However, if there are any sources of stormwater discharged into the conveyance that require a [NPDES] permit but have not received that permit, then the discharges of the resulting mixture of the stormwater and irrigation return flows could be subject to NPDES permit requirements." *See* letter from James Hanlon, Director, EPA Office of Wastewater Management, to William Schweitzer, Director, ACHD, dated July 20, 2007.

Here, the City has applied for coverage for its municipal storm water discharges from its MS4. Some of these storm water discharges flow into irrigation canals owned by Pioneer Irrigation District. As long as the City has a NPDES permit that covers the municipal storm water discharges into the irrigation canals, Pioneer Irrigation District would not be liable for an unauthorized discharge unless the water in the irrigation canals are not irrigation return flow or agricultural storm water runoff.

- 84. Comment regarding Part I.B - Authorized Discharges (Caldwell):** At the end

of existing Part I.B. the commenter recommends adding the following sentence:

"This permit also authorizes discharges of storm water and allowable non storm water discharges subject to the conditions of this permit when such discharges are commingled with flows or discharges from irrigated agriculture, agricultural storm water runoff, or other discharges or flows with a valid NPDES permit exclusion under 40 CFR 122.3."

Response: EPA disagrees that the suggested text is necessary, and declines make the change suggested. See Response to Comment #14.

85. Comment regarding Part IV.A.5.a (Caldwell): The only known outfall on Mason Creek is connected to a detention area and is unlikely to result in any discharges until a storm event exceeding the 2 year average occurs. Also, the three outfalls in the Boise River are all submerged. Therefore it may be difficult or impossible to sample outfalls in accordance with this part and Table IV.A. The commenter recommends the permit require sampling four times per year from the target areas at the target quarterly intervals when weather conditions make such sampling possible.

Response: EPA acknowledges the difficulty of collecting samples from certain storm water outfalls. The purpose of this sampling is to obtain some limited information and data regarding the quality of the storm water discharged to water bodies listed as impaired by IDEQ. EPA has therefore revised the text of Part IV.A.5.a of the Caldwell Permit in the following manner:

"The permittee must sample at least one storm water outfall discharging to each of the following water bodies: Indian Creek, Mason Creek and the Boise River. The permittee may identify alternative location(s) in the monitoring plan and sample at such alternative locations if the minimum number of outfalls per water body are not available to the permittee. The permittee must sample discharges from a minimum of three outfalls.



c: Doug Conde, Deputy Attorney General
Barry Burrell, Water Quality Division Administrator
Craig Shepard, DEQ - Boise Regional Office



Idaho Department of Environmental Quality
FINAL §401 Water Quality Certification

August 20, 2009

NPDES Permit Numbers: IDS-028118, City of Caldwell
IDS-028185, Ada County Highway District

Pursuant to the provisions of Section 401(a)(1) of the Federal Water Pollution Control Act (Clean Water Act), as amended, 33 USC Section 1341 (a)(1), the Idaho Department of Environmental Quality (DEQ) has authority to review National Pollution Discharge Elimination System (NPDES) permits and issue a water quality certification decision.

DEQ has reviewed the proposed NPDES permits and associated fact sheets for the above-referenced facilities. Based upon its review and consideration of this information, DEQ certifies that if the permittees comply with the terms and conditions imposed by the above-referenced permits along with the conditions set forth in this water quality certification, then there is reasonable assurance the discharge(s) will comply with the applicable requirements of Sections 301, 302, 303, 306, and 307 of the Clean Water Act, including the Idaho Water Quality Standards (WQS) (IDAPA 58.01.02) and other appropriate water quality requirements of state law.

This certification does not constitute authorization of the permitted activities by any other state or federal agency or private person or entity. This certification does not excuse the permit holder from the obligation to obtain any other necessary approvals, authorizations or permits, including without limitation, the approval from the owner of a private water conveyance system, if one is required, to use the system in connection with the permitted activities.

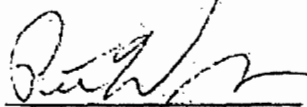
OTHER CONDITIONS

The certification is conditioned upon the requirement that any material modification of this permit or the permitted activities including without limitation, any modifications of the permit to reflect new or modified TMDL waste load allocations or other new information, shall first be provided to DEQ for review to determine compliance with state Water Quality Standards and to provide additional certification pursuant to section 401.

RIGHT TO APPEAL FINAL CERTIFICATION

The final Section 401 Water Quality Certification may be appealed by submitting a petition to initiate a contested case, pursuant to Idaho Code § 39-107(5), and the Rules of Administrative Procedure Before the Board of Environmental Quality, IDAPA 58.01.23, within 35 days of the date of the final certification.

Questions regarding the actions taken in this certification should be directed to Craig Shepard, DEQ (Boise Regional Office) at (208) 373-0550.



Pete Wagner
Regional Administrator
DEQ Boise Regional Office

Appendix B: Snow Dumping and Disposal Practices

Alaska Department of Environmental Conservation. Evaluation of Snow Disposal into Near Marine Environments, Final Report, Prepared by CH2M Hill. June 2006.
http://www.dec.state.ak.us/water/wnpspc/stormwater/dec_snow_disposal_evaluation..htm.pdf

Alaska Department of Environmental Conservation.. Snow Disposal Area Siting Guidance.
http://www.dec.state.ak.us/water/wnpspc/pdfs/dec_snowdisposal_siting_guidance_2007.pdf

Carlson, Robert F., David L. Barns, Nathanael Vaughan, Anna Forsstrom. 2003. Synthesis of Best Management Practices for Snow Storage Areas: University of Alaska, Fairbanks. Department of Civil and Environmental Engineering, Alaska Department of Transportation and Public Facilities Research & Technology Transfer, FHWA-AK-RD-03-04. September.

Oberts, Gary L. "Influence of Snowmelt Dynamics on Storm Water Runoff Quality", Article 3, Feature article from Watershed Protection Techniques, 1(2): 55-61.

South Dakota Department of Water and Natural Resources, Minimizing the Environmental Impact from Snow Disposal, South Dakota Nonpoint Source Program, 1990, www.state.sd.us/denr/dfta/watershedprotection/snow.htm.

U.S. EPA. National Management Measures to Control Nonpoint Source Pollution from Urban Areas, November 2005. EPA-841-B-05-004, pp. 7/1-19,
http://www.epa.gov/owow/nps/urbanmun/pdf/urban_guidance.pdf

EPA Memo: Draft Snow Dumping Policy, EPA and EPA Region 1, 1996

Wheaton, S. Private Snow Disposal Sites (On-Site Snow Storage Only) Operations Guidance (draft), Municipality of Anchorage, 2003.

Wheaton, S.R. and W.J. Rice, 2003. Siting, design and operational controls for snow disposal sites. In *Proceedings - Urban Drainage and Highway Runoff in Cold Climate*, March 25-27, 2003, Riksgården, Sweden, pp.85-95.

Steinkraus, D.. "Heading for the Lake- More than melting snow runs into the water," March 7, 2005. *The Journal Times Online*, Racine County, Wisconsin.

Emmons and Olivier Resources & Center for Watershed Protection. 2005. Issue Paper "G" - Cold Climate Considerations for Surface Water Management. Prepared for Minnesota Stormwater Manual Sub-Committee.

Massachusetts Department of Environmental Protection. 2001. Bureau of Resource Protection - Snow Disposal Guidance. Guideline No. BRPG01-01
<http://www.mass.gov/dep/water/laws/snowdisp.htm>

Minnesota Stormwater Steering Committee. 2005. The Minnesota Stormwater Manual
Version 1.0 November [http://www.pca.state.mn.us/water/stormwater/stormwater-
manual.html](http://www.pca.state.mn.us/water/stormwater/stormwater-manual.html)

Municipality of Anchorage. 2005. Design Criteria Manual. Chapter 2 Drainage. June.

EXHIBIT H



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 20 2007

OFFICE OF
WATER

Mr. William J. Schweitzer
Director
Ada County Highway District
3775 Adams Street
Garden City, Idaho 83714

Dear Mr. Schweitzer:

Thank you for your letter dated January 9, 2006, and subsequent correspondence dated February 21, 2007. You asked us whether the discharge from a conveyance that transports irrigation return flow is subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements if the conveyance also carries stormwater which has been discharged into the conveyance pursuant to an existing NPDES permit.¹ We apologize for the delay in responding to your initial inquiry.

The Clean Water Act (CWA) requires a permit for the "discharge of any pollutant by any person" (CWA § 301(a), USC § 1311(a)). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." (CWA § 502(12), 33 U.S.C. § 1362(12)). A point source is defined as "any discernible confined and discrete conveyance, . . . from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural stormwater runoff." (CWA § 502(14), 33 U.S.C. § 1362(14), 40 CFR § 122.2).

As you know, irrigation return flows are excluded from regulation under the NPDES program (40 CFR § 122.3(f)). Even though an operator may retain irrigation return flow exemptions for portions of its discharge, the stormwater portions of its discharge may still be subject to NPDES regulation. As defined in section 40 CFR 122.26, stormwater discharges from certain municipal separate storm sewer systems (MS4s), construction sites greater than one acre, certain industries, and other designated sources require an NPDES permit. MS4s are defined at 40 CFR § 122.26(b)(4) and (b)(7).

¹ In this letter, the Environmental Protection Agency (EPA or Agency) is not addressing whether the Bureau of Reclamation conveyance and drain facilities in question would be considered part of a municipal separate storm sewer system, waters of the United States, both, or neither.

As noted in the preamble to the NPDES Permit Application Regulations for Storm Water Discharges (Phase I Rule), EPA's longstanding position is that irrigation return flows are exempt from permit coverage and commingling of irrigation return flow and stormwater does not automatically revoke the exempt status of irrigation return flow:

One commenter stated that irrigation flows combined with stormwater discharges should be excluded from consideration in the stormwater program. The Agency would note that irrigation return flows are excluded from regulation under the NPDES program. Section 402(1) states that the Administrator or the State shall not require permits for discharges composed entirely of return flows from irrigated agriculture. The legislative history of the 1977 Clean Water Act, which enacted this language, states that the word "entirely" was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production. Congressional Record Vol. 123 (1977), pg. 4360, Senate Report No. 95-370. Accordingly, a stormwater discharge component, from an industrial facility for example, included in such "joint" discharges may be regulated pursuant to an NPDES permit either at the point at which the stormwater flow enters or joins the irrigation return flow, or where the combined flow enters waters of the United States or a municipal separate storm sewer. 55 Fed. Reg. 47990, 47996 (Nov. 16, 1990)

Regulated stormwater may not be discharged into receiving waters without a permit. Additionally, other point source discharges of pollutants to waters of the United States are only permissible pursuant to an NPDES permit. It is the position of the Agency that these point source discharges may be authorized by a permit at the point they discharge to receiving waters or at the point they discharge into a separate conveyance. If an operator of a conveyance is transporting commingled irrigation return flow and a regulated point source discharge, the conveyance operator may need to be authorized to discharge under an NPDES permit if the regulated point source discharge is not already covered under a permit. In other words, if the point source discharge is already subject to an NPDES permit (e.g., an MS4 permit) before it is commingled with the irrigation return flow, the operator of the conveyance transporting that commingled flow does not need its own NPDES permit for the commingled discharge.

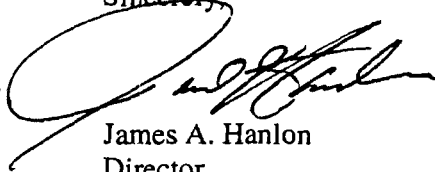
However, if there are any sources of stormwater discharged into the conveyance that require a permit but have not received that permit, then the discharge of the resulting mixture of the stormwater and irrigation return flows could be subject to NPDES permit requirements. The permitting authority may then determine that the operator of the conveyance must seek permit coverage as a permittee or co-permittee. Hence, if the operator of the irrigation conveyance wants to assure that their discharge of commingled stormwater and irrigation return flows will not be subject to NPDES permitting requirements, they must make certain that all regulated stormwater discharged into their conveyance has received appropriate permit coverage. In the facts you describe, if the Ada County Highway District (ACHD) holds an MS4 permit for the stormwater it introduces to the Bureau of Reclamation irrigation canals, the Bureau of Reclamation will not need to obtain an NPDES permit to lawfully discharge the resulting commingled irrigation return flows and stormwater.

Your letter also asked whether "agricultural runoff and irrigation return flows that are also conveyed through these Bureau of Reclamation facilities to waters of the U.S. remain exempt from NPDES permit requirements." The answer is yes. Commingling of agricultural runoff, irrigation return flow and NPDES-permitted stormwater discharges does not revoke the exempt status of irrigation return flow from NPDES program requirements. In other words, the discharge of regulated stormwater authorized by a permit does not affect the status of the irrigation return flow with which it is commingled.

In summary, ACHD's stormwater discharge does not need to be authorized under two NPDES permits. If all regulated stormwater is subject to a permit before entering the conveyance, then the Bureau of Reclamation will not be required to obtain permit coverage for its discharge of commingled irrigation return flow and regulated stormwater.

I hope this addresses your request. If you have further questions, please contact Ryan Albert of my staff at (202) 564-0763 or Karyn Wendelowski in the Office of General Counsel at (202) 564-5493.

Sincerely,

A handwritten signature in black ink, appearing to read "James A. Hanlon", written over a horizontal line.

James A. Hanlon

Director

Office of Wastewater Management

ORIGINAL

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FILED
A.M. 4:55 P.M.

SEP 23 2009

**CANYON COUNTY CLERK
T EARLS, DEPUTY**

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Attorneys for Defendant/Counterclaimant

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

PIONEER IRRIGATION DISTRICT,

Plaintiff,

vs.

CITY OF CALDWELL,

Defendant.

CITY OF CALDWELL,

Counterclaimant,

vs.

PIONEER IRRIGATION DISTRICT,

Counterdefendant.

Case No. CV 08-556-C

**MEMORANDUM IN SUPPORT OF
CITY OF CALDWELL'S THIRD
MOTION FOR SUMMARY
JUDGMENT**

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Defendant/Counterclaimant City of Caldwell (“Caldwell”) hereby submits this Memorandum In Support Of Caldwell’s Third Motion For Summary Judgment.

I. INTRODUCTION

Caldwell’s third motion for summary judgment seeks a ruling on two issues not decided by Caldwell’s two prior motions for summary judgment. First, Caldwell seeks a ruling as a matter of law that Pioneer Irrigation District (“PID”) has no proof of ownership for any of its claimed facilities. To the extent the Court finds that PID has properly established ownership rights for the facilities that it has identified, Caldwell also seeks a ruling foreclosing PID from identifying any additional facilities for which PID claims ownership that PID has not previously identified in this litigation. Second, Caldwell seeks a ruling that as a matter of law, there is no basis or reason to believe that PID is exposed to liability under the CWA , 33 U.S.C. § 1251, *et seq.* (“CWA”). Any potential claim under the CWA is moot based on Caldwell’s recently-issued NPDES permit. Caldwell therefore seeks a ruling that PID’s concerns regarding CWA liability do not constitute a material or unreasonable interference and are not valid bases for PID’s trespass and nuisance claims.

II. FACTUAL BACKGROUND

A. PID’s Failure To Identify Ownership Rights For Its Claimed Facilities.

On January 16, 2008, PID filed its complaint against Caldwell generally contending that the discharge of “urban stormwater” by Caldwell materially interfered with PID’s use and enjoyment of its claimed facilities. The Complaint contained a number of general assertions about PID’s history and facilities including the following statements:

Pioneer was organized in 1903 and has the distinction of being one of the first irrigation districts formed in Idaho after the Idaho legislature enacted statutes earlier that year providing for the creation of irrigation districts.

In addition, many of Pioneer's irrigation and drainage facilities date back to the late 1800's.

For at least 100 years, Pioneer's irrigation delivery and drainage systems in Canyon County have been fully visible and have provided notice that any encroachments into its facilities are strictly prohibited without express written permission from Pioneer to construct such encroachments.

Complaint ¶¶ 1, 9. These factual allegations are identical to the factual allegations contained in the Second Amended Complaint that is currently on file with the Court. *See* Second Amended Complaint, ¶¶ 1, 9.

On April 9, 2008, Caldwell served its first set of discovery on PID. Interrogatory No. 3 requested PID to identify "all canals, laterals, and ditches, owned or operated by Pioneer, including the name, point of origin, and ending point of each canal, lateral, and ditch." *See* Ex. A to the Affidavit of A. Dean Bennett dated September 23, 2009 ("Bennett Aff."). In response to that request, PID referred Caldwell to a document titled "Canals/Ditches in Pioneer Irrigation." *See* Ex. B to the Bennett Aff. (attaching excerpts from PID's discovery responses to Caldwell's First Set of Discovery Requests). PID did not provide any other information about its claimed canals, laterals, and ditches, and has not, as of the date of this filing, supplemented its answer to Interrogatory No. 3 to provide any additional information.

On April 15 and April 27, 2009, Caldwell took the deposition of PID's superintendent Jeff Scott. Caldwell asked Mr. Scott to specifically identify the drains that PID contends it owns. Mr. Scott identified the "letter drains" which include, presumably, the A Drain, B Drain, C Drain, D Drain, and E Drain. *See* Ex. C to the Bennett Aff. (attaching excerpts from the deposition of Jeff Scott ("Scott Dep.") at 311:10- 313:13). When asked about the basis for his belief that PID owned the "letter drains," Mr. Scott responded that it was what he had been told. Scott Dep. at 325:3-326:19; 410:1-411:25; 330:13-15. *See also* Scott Dep. 283:24-284:4

MEMORANDUM IN SUPPORT OF CITY OF CALDWELL'S THIRD MOTION FOR SUMMARY JUDGMENT- 2

(A Drain); Scott Dep. at 65:14-17 (B Drain). In addition, Scott admitted that PID does not own any of the drains within its district other than the A Drain, the B Drain, the C Drain, the D Drain, and possibly the E Drain. Scott Dep. at 311:13-312:14.

PID's Rule 30(b)(6) deponent on ownership testified consistent with Mr. Scott that PID owns the A Drain, B Drain, and the 500 Lateral. Ex. D to the Bennett Aff., (attaching Rule 30(b)(6) deposition of PID's Rule 30(b)(6) deponent Mark Zirschky ("PID Dep.") at 489:7-9; 521:3-5; 719:25-720:2). PID's 30(b)(6) designee on ownership rights admitted that he could not identify any instances of fee simple ownership by PID aside from its physical building location. PID Dep. at 427:5-15.

B. PID's Unsupported Allegations Regarding the CWA

As noted, on January 16, 2008, PID filed its complaint against Caldwell. The Complaint included a number of general allegations regarding potential liability under the CWA arising out of the discharge of storm water:

The federal CWA("CWA"), 33 U.S.C. § 1251, *et seq.*, prohibits point source discharges of pollutants into waters of the United States without a proper National Pollution Discharge Elimination System ("NPDES") permit. CWA § 402.

Municipal storm water runoff is classified as a point source requiring an NPDES permit under the CWA. CWA § 402(p).

Pioneer is generally exempt from liability under the CWA regarding the operation of its facilities, as agricultural return flows are exempt from the CWA's permitting requirements so long as discharges are "composed *entirely* of return flows from irrigated agriculture." *Id.* at § 402(l) (emphasis added).

Unauthorized point source municipal storm water discharges such as those which have been constructed in Pioneer facilities pursuant to the Manual and/or by the Defendant may expose Pioneer, as owner and/or operator of those facilities to both civil and criminal liability from \$25,000 to \$50,000 pursuant to CWA restrictions and penalties. *Id.*

Complaint ¶¶ 33-36. The Second Amended Complaint contains identical allegations. *See* Second Amended Complaint at ¶¶ 33-36.

Despite including allegations about the CWA and its potential application to this case, PID admitted in response to Requests for Admission served by PID that it is not bringing any claim against Caldwell under the CWA. *See* Ex. E to the Bennett Aff., (attaching excerpts from PID's responses to Caldwell's Second Set of Discovery Requests Nos. 11-15). PID also admitted that it has never been cited for any violation of the CWA. *Id.* PID acknowledged that the Environmental Protection Agency ("EPA") has never threatened PID with enforcement of the CWA based on storm water allegedly attributable to Caldwell. *Id.* Likewise, PID admitted that the EPA and/or the Idaho Department of Environmental Quality have never initiated proceedings against PID. *Id.*

On September 4, 2009, the EPA issued Caldwell's NPDES permit for the discharge of municipal storm water. *See* Ex. F to the Bennett Aff. The permit is to become effective on October 15, 2009. *Id.* Based on the permit, PID's CWA-based claims are moot to the extent they assume that Caldwell does not have an NPDES permit. In addition, the EPA's response to PID's comment in opposition to Caldwell's NPDES permit application makes clear that commingling Caldwell's permitted storm water with PID's exempt return flows does not subject PID to CWA exposure. *See* Ex. G to the Bennett Aff. at ¶ 83 p. 85. In that document, the EPA states as follows:

Here, the City has applied for coverage for its municipal storm water discharges from its MS4. Some of these storm water discharges flow into irrigation canals owned by Pioneer Irrigation District. As long as the City has a NPDES permit that covers the municipal storm water discharges into the irrigation canals, Pioneer Irrigation District would not be liable for an unauthorized

discharge unless the water in the irrigation canals are not irrigation return flow or agricultural storm water runoff.

Ex G to the Bennett Aff. at p. 35.

III. ARGUMENT

A. Summary Judgment Standard

The law in Idaho is well-established. If the trial court determines there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dep't of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1993).

In general, when assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the non-moving party. *Dodge-Farrar v. American Cleaning Servs., Co.*, 137 Idaho 838, 54 P.3d 954 (Ct. App. 2002).

However, in an action that is to be tried before the court without a jury, the court is not constrained to draw inferences in favor of the party opposing a motion for summary judgment. *See, e.g., Crown v. Klein Bros.*, 121 Idaho 942, 945, 829 P.2d 532, 535 (Ct. App. 1991). Rather, the court is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts. *Id.* “Where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of facts, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.” *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982).

In *Celotex Corp. v. Catrett*, the United States Supreme Court held that a court may properly enter summary judgment against a party that fails to introduce facts in support of its claims or defenses:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed “to secure the just, speedy and inexpensive determination of every action.” . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (citations omitted); *see also Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 239, 108 P.3d 380, 386 (2005) (adopting *Celotex*). Therefore, to survive a motion for summary judgment, a party cannot simply rest on its bare allegations. *Id.* If a party fails to introduce any facts supporting an element on which the party bears the burden at trial, summary judgment is required pursuant to Rule 56. *See id.* A party may not rest on mere allegations or speculation to survive a motion for summary judgment.

B. PID has No Proof Of Ownership for Its Claimed Facilities.

Aside from its general assertions about its claimed facilities, PID has never established that it actually owns all of the drains, canals, laterals, and other facilities over which it claims ownership in this case. This is crucial, because PID claims that the Manual results in material and unreasonable interference to PID’s claimed facilities. PID cannot, on one hand, argue that the Manual results in material and unreasonable interference while failing to introduce proof of ownership of the specific facilities that it claims are implicated by the Manual. Moreover, a summary document merely depicting the facilities within PID and the general testimony by PID’s Rule 30(b)(6) designee and superintendent are inadequate to prove ownership.

As discussed below, in order to prove ownership, PID must introduce evidence that it obtained ownership rights to its claim facilities through (1) eminent domain, according to the procedures provided by statute; (2) express conveyance; or (3) prescription. The Idaho Code and Idaho case law expressly recognize that PID may obtain facilities by any one of these alternative procedures. Absent proof that PID did in fact obtain facilities in one of these ways, Caldwell is entitled to a ruling that PID has no rights in the facilities for which it has no proof of ownership.

Idaho Code § 1106 provides irrigation districts with the right of eminent domain. That section states that “[i]n case of the refusal of the owners or claimants of any lands, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the person or persons desiring the right of way may proceed as in the law of eminent domain.” Therefore, to the extent that PID needed to obtain a right of way through the land of an owner or claimant of land who refused to allow passage, PID could have obtained rights through eminent domain proceedings. PID would, of course, need to introduce proof that it had initiated such proceedings in order to prove that it obtained ownership rights through this section. PID has not introduced evidence that it did in fact obtain rights to its claimed facilities through the procedure allowed by Idaho Code § 1106 and that it followed established procedures for eminent domain.

To the extent PID claims an ownership interest in any drains, Idaho Code § 1107 contains similar language for obtaining a right of way for drains:

Whenever the owner or owners of any parcel or parcels of land desire to construct a drain for the purpose of carrying off surplus water, and they cannot agree among themselves or with the parties who own land below through which it is expedient to carry the drain in order to reach a natural waterway, then proceedings may be had in the same manner as in cases of eminent domain affecting irrigating works of diversion, and the right of way for such drains shall be regarded as equal to that of irrigation canals.

Idaho Code § 1107 (emphasis added). PID has not introduced any evidence that it obtained rights of way to its drains through eminent domain proceedings, as authorized by Idaho Code § 42-1107.

If PID's claimed facilities run across state lands, PID is authorized to obtain a right of way provided it pays the state just compensation, "to be ascertained in the manner prescribed by law for the taking of private property for a public use." Idaho Code § 1104. PID has not introduced any evidence that it obtained its rights of way through the procedure provided by Idaho Code § 42-1104.

As discussed in *Nampa & Meridian Irr. Dist. v. Washington Fed. Savings*, 135 Idaho 518, 522, 20 P.3d 702, 706 (2001), an irrigation district can obtain rights of way through express conveyance. Aside from the limited portions of the A Drain and 500 Lateral covered by the two isolated express easements attached to the Affidavit of Dawn Fowler dated September 3, 2009, PID has introduced no evidence that it holds an ownership interest in any other portion of its claimed facilities.

Finally, PID lacks evidence that it has established prescriptive rights in its claimed facilities. In order to establish a prescriptive easement, PID must introduce evidence of "open, notorious, continuous, and uninterrupted use under a claim of right and with the knowledge of the owner of the servient tenement for the prescriptive period of five years." *See Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (Idaho 2000). A claimant must establish each of the necessary elements by clear and convincing evidence in order to obtain an easement by prescription. *Id.* "Because 'it is no trivial thing to take another's land without compensation,' easements by prescription are not favored by the law." *Hughes v. Fisher*, 142 Idaho 474, 480,

129 P.3d 1223, 1229 (2006) (quoting *Simmons v. Perkins*, 63 Idaho 136, 143, 118 P.2d 740, 744 (1941)).

As argued in PID's second motion for summary judgment, "with respect to manmade irrigation systems, a prescriptive right to waste water into a lower canal 'cannot be established short of direct proof that the water has actually flowed therein during the period necessary to establish the right.'" PID's Br. In Support of Second Motion for Summary Judgment at 12, quoting *Last Chance Ditch Co. v. Sawyer*, 35 Idaho 61, 67, 204 P. 654, 655 (1922). "It is the burden of the claimant of a prescriptive right to show the '*extent and amount*' of his use of the right claimed." *Id.*

Here, PID contends that it has a prescriptive right to use its claimed facilities, but PID's superintendent admitted at deposition that it has not conducted flow capacity studies for any portion of its facilities other than "[t]he Phyllis Canal, its laterals; the highline, its laterals, the low line, and its laterals. Scott Dep. 167:18-168:7. Therefore, PID lacks necessary proof of the extent and amount" of the flows that are necessary to establish an easement by prescription under Idaho law. *Last Chance Ditch Co.*, 35 Idaho at 67, 204 P. at 655.

In *Pioneer Irrigation District v. Smith*, 48 Idaho 734, 285 P. 474 (1930), the Idaho Supreme Court discussed the nature and extent of the plaintiff Pioneer Irrigation District's rights in a particular facility that it obtained through prescription. The Court did not, however, state that Pioneer had established prescriptive rights for the entirety of its claimed system. Instead, it merely discussed Pioneer's prescriptive rights in the portion of the facilities that were at issue in the case. Therefore, *Pioneer Irrigation District* does not provide PID with authority that it has obtained prescriptive rights for the entirety of its claimed system.

Here, PID has introduced no evidence necessary to prove that it obtained rights in its claimed facilities through prescription. PID has introduced no evidence of the “extent and amount” of the flows through its claimed facilities. Moreover, PID has not introduced clear and convincing evidence showing the precise boundaries of its claimed facilities, the periods of its prescriptive use, and/or demonstrated that the water has actually flowed in the relevant portions of PID’s claimed facilities during the period necessary to establish the right. PID cannot as a matter of law meet its burden and summary judgment is appropriate on PID’s claim of ownership based on prescriptive rights.¹

C. PID Has No “Exposure” Under the CWA , Therefore Summary Judgment is Properly Granted.

In its Second Amended Complaint, PID relies on an alleged “exposure” under the CWA (“CWA ”) for its claims to declaratory relief, and also as a basis for its nuisance claim. *See Second Amended Complaint for Declaratory and Injunctive Relief* (“SAC”), ¶¶ 33-36. As a matter of law, PID’s CWA -based claims are moot to the extent that they are premised on a claim of unpermitted discharges. The EPA has issued Caldwell a CWA National Pollution Discharge Elimination System (“NPDES”) permit for its storm water discharges. *See* 33 U.S.C. § 1342(a)(1).

To the extent that PID attempts to argue that Caldwell’s NPDES permitted discharge commingled with PID’s exempt irrigation return flows create “exposure” under the CWA , that argument lacks merit. PID has already presented this argument to the EPA in comments on Caldwell’s NPDES application and draft permit, and the EPA expressly rejected the argument.

¹ To the extent the Court finds that PID has properly established ownership rights in the facilities that it has identified, Caldwell also seeks a ruling foreclosing PID from later claiming ownership rights in any facilities that it has not previously identified as being owned by PID in this litigation.

In addition, the Eleventh Circuit has addressed the commingled discharge issue, and like the EPA, that court concluded that commingling permitted discharge with exempt agricultural flows does not create “exposure” or liability under the CWA . Therefore, Caldwell is entitled to summary judgment on PID’s CWA -based claims.

1. Because Caldwell’s Storm Water Discharges are Authorized by a CWA -NPDES Permit, PID’s CWA -Based Claims are Moot and Caldwell’s Storm Water Discharges Create No “Exposure” to PID.

A violation of the CWA occurs where a party: (1) discharges, (2) a pollutant; (3) in the navigable waters of the United States, (4) from a point source, (5) without a permit. 33 U.S.C. § 1311(a); *see also Ass’n to Protect Hammersley Eld, & Totten Inlets v. Taylor Res.*, 299 F.3d 1007, 1009 (9th Cir. 2002). However, Congress has implemented a system allowing the EPA to issue NPDES permits authorizing point source discharges which do not constitute violations of the CWA . *See* 33 U.S.C. § 1342(a)(1).

Each CWA -related allegation in PID’s Second Amended Complaint assumes that Caldwell does not have a “proper” NPDES permit. *See* SAC ¶¶ 33-36. The EPA, however, recently issued Caldwell an NPDES permit on September 4, 2009, which becomes effective October 15, 2009. *See* Ex. F to the Bennett Aff. Therefore, at the time of the hearing on this motion, Caldwell’s storm water discharge will be expressly allowed under an NPDES permit and PID’s claim on this point will be moot. *See Farrell v. Whiteman*, 146 Idaho 604, 610, 200 P.3d 1153, 1159 (Idaho 2009) (“A case becomes moot when the issues presented are no longer live.”). Further, because discharges authorized under an NPDES permit cannot constitute a basis for a violation of the CWA , *Hammersley*, 299 F.3d at 1009, PID’s alleged “exposure” to criminal or civil liability is unfounded. Therefore, summary judgment as to any such CWA -based “exposure” is properly granted in favor of Caldwell.

2. **Commingling Permitted Discharges and Exempt Irrigation Return Flows Creates no “Exposure” to PID.**

Caldwell anticipates that PID may also urge that Caldwell’s NPDES permitted point source discharges, when commingled with PID’s irrigation return flows, specifically exempt from the CWA ’s permit requirement (*see* 33 U.S.C. § 1362(14)), cause PID “exposure” under the CWA . That argument lacks merit and should be rejected.

PID raised the same argument to the EPA through the agency’s comment process with regard to Caldwell’s NPDES application and draft permit. *See* Ex. G to the Bennett Aff. PID submitted the following comment.

Comment (Pioneer Irrigation District): Caldwell has allowed developers to install multiple points of municipal storm water discharge into the Irrigation District’s irrigation and drainage facilities without authorization. This practice jeopardizes the Irrigation District’s protections under the irrigation return flow.

See id. at ¶ 76, page 31.

Consistent with the statutory and regulatory and framework of the CWA , the EPA responded as follows:

Response: Irrigation/agricultural return flows are excluded from regulation under the NPDES program. *See* 40 C.F.R. § 122.3(f). Storm water discharges from certain MS4s, construction sites greater than one acre, certain industries, and other designated storm water sources require an NPDES permit. 40 C.F.R. § 122.26. Irrigation return flows are exempt from storm water permit coverage and the commingling of irrigation return flow and storm water does not automatically revoke the exempt status of the irrigation return flow. *See* 55 Fed. Reg. 47990, 47996 (Nov. 16, 1990). The MS4 discharges may be authorized by a permit at the point they discharge to receiving waters or at the point they discharge into a separate conveyance. **If the MS4 discharge is permitted before it is commingled with the irrigation return flow, the operator of the conveyance transporting the commingled flow does not need its own NPDES permit for the commingled discharge and the irrigation return flow would retain its exemption.** In other words, if the MS4 discharges into

the Irrigation District's irrigation facilities are permitted, then the irrigation return flow exemption would remain. It should be noted, however, that if the MS4 discharge or other NPDES regulated discharge is unpermitted when it enters the Irrigation District's facilities, then the Irrigation District may need to be authorized to discharge under a NPDES permit. Therefore, if there are NPDES regulated point source discharges into the Irrigation District's facilities, it would be in the Irrigation District's best interest to ensure that those point source discharges are permitted through an appropriate NPDES permit such as the City MS4 Permit at issue here. *See also* letter from James Hanlon, Director, EPA Office of Wastewater Management, to William Schweitzer, Director, ACHD, dated July 20, 2007.

Id. at ¶ 76, page 32 (emphasis added).

Here, Caldwell's storm water discharges are authorized by the City's MS4 Permit *before* they are commingled with PID's irrigation return flows, and therefore the commingled flows do not require a separate NPDES permit and the irrigation return flows retain the exemption from the NPDES permit requirement.

The letter referenced at the end of the EPA's Response was issued by the Director of EPA's Office of Wastewater Management two years ago. That letter is consistent with the Response, and summarizes the EPA's position as follows:

Commingling of agricultural runoff, irrigation return flow and NPDES-permitted stormwater discharges does not revoke the exempt status of irrigation return flow from NPDES program requirements. In other words, **the discharge of regulated stormwater authorized by a permit does not affect the status of the irrigation return flow with which it is commingled.**

See Ex. H to the Bennett Aff. ("EPA Letter") (emphasis added).

Both the EPA's Response and the July 20, 2007 EPA letter are entitled to deference to the extent that the reasoning therein has the "power to persuade." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (noting the Supreme Court has "long-recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is

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entrusted to administer.”). The weight properly accorded to the EPA’s letter depends “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors that give it power to persuade if lacking power to control.” *Id.* at 228 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944)).

Here, as demonstrated by the EPA’s citation to its earlier letter and the regulations cited within the Response and the EPA Letter, it is clear that the EPA’s position and reasoning have been consistent through multiple pronouncements. Both the Response and the EPA Letter recognize that irrigation return flows, like that of PID, are excluded from regulation under the NPDES program. *See* Response and EPA Letter (citing 40 C.F.R. § 122.3(f)). The pronouncements recognize also that municipal storm water is authorized under a separate NPDES permit (*id.* (citing 40 C.F.R. § 122.26)), and that the permit requirements apply at the point of discharge to receiving waters or at the point they discharge into a separate conveyance. *Id.* (citing 55 Fed. Reg. 47990, 47996 (Nov. 16, 1990)). Ultimately, the EPA’s position that NPDES permitted discharges do not affect the exempt status of irrigation return flows is consistent with the statutory and regulatory framework of the CWA. *See Mead Corp.*, 533 U.S. 218, 228 (noting that deference is properly given to “the well-reasoned view[] of the agenc[y] implementing a statute”).

Additionally, the Eleventh Circuit addressed an analogous situation and held that a permit or exemption is not affected when the exempt discharge is commingled with NPDES-permitted discharge. *See Fisherman Against the Destruction of the Environment v. Closter Farms, Inc.*, 300 F.3d 1294 (11th Cir. 2002). In that case, the court decided whether the CWA required a permit for a farm to discharge water from its water management system into an adjacent lake. The plaintiffs alleged that the defendant was violating the CWA by discharging pollutants into

the lake without an NPDES permit. *Id.* at 1296. Specifically, the plaintiffs argued that even though the defendants enjoyed an agricultural exemption under the CWA , because the irrigation return flows were combined with pollutants originating from non-agricultural properties adjacent to the defendant's property, the combined discharge resulted in a violation of the CWA . *Id.* at 1296. The court disagreed and affirmed the district court's findings that the defendants had "established that the discharges from [the adjoining properties] are either the subject of existing NPDES permits or are exempted from NPDES permitting." *Id.* at 1298. Consequently, no additional NPDES permit was required, and the discharges from the adjoining properties had no effect on the exemption. *See id.*

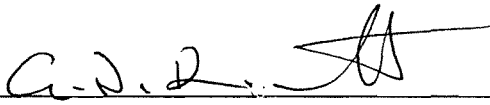
Given the EPA's position that the discharge of permitted storm water does not affect the status of exempt irrigation return flows, and given the Eleventh Circuit's ruling in *Closter Farms* that the commingling of discharges authorized under an NPDES permit with discharges authorized under an agricultural exemption has no effect on an agricultural exemption, PID cannot prevail as a matter of law on its CWA -based claims. PID faces no "exposure" from the commingling of Caldwell's NPDES permitted discharge and PID's exempt irrigation return flows. Accordingly, summary judgment for Caldwell on PID's CWA-based claims is appropriate.

IV. CONCLUSION

For the foregoing reasons, Caldwell respectfully requests that the Court grant its Third Motion for Summary Judgment and rule that (1) PID has no proof of ownership of any of its claimed facilities; and (2) that PID has no risk of liability under the CWA.

DATED this 23 day of September, 2009.

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CERTIFICATE OF SERVICE


I hereby certify that on this 23 day of September, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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